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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-828

DEMETRIA MOSES, CORRINE E. SMITH, TONJA PERRY, JOAN A. ABERNATHY, AND DONNA A. GAINES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

To The Honorable Justices of the Supreme Court of the United States:

Petitioners Demetria Moses, Corrine E. Smith, Tonja Perry, Joan A. Abernathy, and Donna A. Gaines, pray that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals, reported at 339 A.2d 46, and the unreported opinion of the Superior Court of the District of Columbia, are reproduced in the appendices to this petition.

JURISDICTION

The order of the Court of Appeals was entered on May 22, 1975 and a timely petition for rehearing *en banc* was denied on July 14, 1975. Time to file this petition for certiorari was extended to December 11, 1975, by order of the Chief Justice entered on September 26, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether D.C. Code, §22-2701 (1973 Ed.) making solicitation for prostitution a criminal offense violates the First Amendment's guarantee of freedom of speech.

2. Whether the statute is vague and overbroad, in violation of the First, Fifth and Sixth Amendments, in its use of such terms as "enticing" and "prostitution" and because it covers all such proposals, direct and indirect, regardless of time, place or other circumstance.

3. Whether the statute, as applied, violates the First Amendment in that it is enforced exclusively by police decoys under circumstances incapable of producing lawless action.

4. Whether if the speech is treated as an inchoate crime preparatory to prostitution it denies substantive due process and violates the constitutional right to privacy.

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5. Whether application of the statute's prostitution provision exclusively against women denies them the equal protection guaranteed by the due process clause of the Fifth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution. The statute involved is D.C. Code, §22-2701 (1973 Ed.) which provides as follows:

> It shall not be lawful for any person to invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading, any person or persons sixteen years of age or over in the District of Columbia, for the purpose of prostitution, or any other immoral or lewd purpose, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both.

STATEMENT OF THE CASE

Petitioners were charged with soliciting for prostitution in violation of D.C. Code §22-2701 (herein referred to as "the statute"). The Superior Court, after preliminary hearing, dismissed the informations on the grounds that the statute violated petitioners' rights to privacy and freedom of speech. The Court also held that the enforcement policy of the Metropolitan Police violated petitioners' right to equal protection.

The District of Columbia Court of Appeals reversed, holding that (1) there is no constitutional right to privacy where solicitations occur in a public place, and (2) a solicitation for prostitution is not entitled to immunity under the First Amendment. The Court conceded that "the speech condemned is not the type intended or likely to produce imminent lawless action or violence", 339 A.2d 46, 51 (D.C. App. 1975), but held that the prohibition against solicitation was reasonable because "regulation of business conditions and commercial ventures long has been recognized to be a valid exercise of police power." 339 A.2d at 53. In addition, the Court determined that there is "a legitimate national state and community interest in maintaining a decent society" and held that "the stemming of commercialized sexual solicitations is an acceptable means of furthering this interest", *Id.* at 54.

The Court of Appeals did not dispute the trial court's finding that only women are arrested for such solicitation. It held, however, that the policy was not discriminatory because males proposing sodomy to other males are arrested under §22-2701 for the different offense of "soliciting for other lewd or immoral purposes." *Id.* at 55.

REASONS FOR GRANTING THE WRIT

1. The statute violates the First Amendment's guarantee of freedom of speech by making it criminal to propose private sexual intercourse for pay. Neither §22-2701 nor any other District of Columbia statute makes prostitution itself criminal. But there can be no "criminal solicitation" if the activity solicited is in itself lawful. While solicitation to commit a crime may be properly proscribed, the District of Columbia cannot punish mere speech which solicits another to commit an act which is itself not a

crime. Accordingly, the invitation to engage in prostitution is constitutionally protected speech, (*Terminiello v. Chicago*, 337 U.S. 1 (1949); *Thomas v. Collins*, 323 U.S. 516, 539-540 (1945)) falling under none of the categories susceptible to prohibition, e.g. obscenity (*Roth v. United States*, 354 U.S. 476 (1957)), fighting words (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)), or imminent incitement to illegal action (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

2. This statute curtailing speech alone presents two additional problems of facial unconstitutionality.

(a) The defect of vagueness arises from the ambiguity of such undefined terms as "enticing" and "prostitution." Accordingly, it does not meet the Court's requirement of clarity in criminal laws, *McBoyle v. United States*, 283 U.S. 25, 27 (1931). "Entice" obviously includes non-verbal conduct which is regarded as alluring. See I Shorter Oxford Dictionary (1947), p. 617; Black's Law Dictionary (rev. 4th Ed., 1968), p. 626, and the statute contains no definition of prostitution.

(b) Further, the statute is unconstitutionally overbroad in proscribing any conversation leading to prostitution, regardless of the circumstances. This would include private conversations in the home between consenting adults. It is not a regulation with "narrow specificity", (*N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)) and thus fails to meet this Court's test of "reasonable time, place and manner of regulation" (*Ernoznick v. City of Jacksonville*, ___ U.S. ___, 95 S.Ct. 2268, 2272-3 (1975)). Hence, it is broader than any justifiable governmental interest would warrant. See also, *Cohen v. California*, 403 U.S. 15 (1971).

3. This case, not atypical, presents the additional question of whether the statute, as applied, is unconstitutional under the First Amendment. The invitation is made to a police officer whose intention is to entrap the defendant not to consummate the act of prostitution. Indeed, of the 550 arrests made for the offense of solicitation for purposes of prostitution in the District of Columbia during 1973, all were of women, and all were made by male undercover police officers. *United States v. Wilson*, 342 A. 2d 27, 30 n. 5 (D.C. App. 1975). The resulting constitutional problem is not that of entrapment (see *United States v. Russell*, 411 U.S. 423 (1973)) but whether "such advocacy" is ". . . directed to inciting or producing imminent lawless action and is likely to produce such action", *Brandenburg v. Ohio, supra*, n. 1 at 447. The American Law Institute notes that "insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses." Modern Penal Code, §250.1, Comment (Tent. Draft No. 13, 1961). See also, *Williams v. District of Columbia*, 419 F.2d 638, 646, n. 23 (D.C. Cir. 1969).

4. The monetary aspect of the speech here in question does not remove it from First Amendment protection. The reliance of the court below upon *Valentine v. Christensen*, 316 U.S. 52 (1942) was misplaced. In *Bigelow v. Virginia*, ____ U.S. ____, 95 S.Ct. 2222, 2235 (1975), this Court held that simply because the speech involved has commercial aspects "a court may not escape the task of assessing the First Amendment interest at stake and weighing it against a public interest allegedly served by the regulation." The cases relied upon by the Court below

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in lieu of the required balancing process are clearly distinguishable. Unlike *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 371 (1973), the advertised activity here is not illegal, and unlike *Paris Adult Theater v. Slaton*, 413 U.S. 49 (1973), the speech is not obscene.

While certain limitations on advertising have been upheld, see e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), this is very different from the outright prohibition imposed by §22-2701. Such prohibition must be subjected to careful scrutiny; any regulation of speech protected by the First Amendment must be tailored to the exigencies involved.

5. The statute violates the due process clause of the Fifth Amendment and the constitutional right of privacy even if solicitation is assumed to be an inchoate offense leading to the act of prostitution.

Substantive due process prevents the state from making conduct criminal unless it constitutes an injury to society of which the state can take cognizance. See Packer, *The Limits of the Criminal Sanction* (1968), *passim*. This principle is reflected in such cases as *Robinson v. State of California*, 370 U.S. 660 (1962), involving the cruel and unusual punishment clause, and *Thompson v. Louisville*, 362 U.S. 199 (1960) where the Court held that it is a violation of due process to convict and impose punishment without evidence of guilt. See also *Gregory v. Chicago*, 394 U.S. 111 (1969).

Prostitution historically has been made criminal on the assumption that it is attended by evils which the state is entitled to prevent. While these evils were not enumerated by the court below to support its decision,

the Superior Court here effectively disposed of their supposed connection with prostitution. (Appendix, p.). But even if they were by-products of prostitution, the constitutional way to meet them is by legislation directed to those evils, not by outright criminalization.

The counterpart to substantive due process is the constitutional right of privacy, as applied during the last decade to the sexual area, which includes the right to make personal decisions relating to one's sexual life. *Roe v. Wade*, 410 U.S. 113 (1973), *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), *Loving v. Virginia*, 388 U.S. 1 (1967), *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Prostitution, too, should be treated as a private consensual matter between individuals who are entitled to decide upon the control of their bodies. See, *e.g.*, Rosenbleet and Pariente, The Prostitution of the Criminal Law, 11 *Amer. Crim. Law Rev.* 373, 420 (1973). Contrary to the assertion of the court below, the right to privacy is not lost because the conduct, or some portion of it, occurs in public. See *Paris Adult Theater, supra.*

Where the fundamental right to privacy is invaded by governmental action, that action must be supported by some compelling interest on the part of the government. The burden was not met by the government in this case. Nor was the right of privacy in recent sex cases lost because of their business aspects. Hence, although contraceptives are sold, their use is constitutionally protected (*Griswold v. Connecticut, supra; Eisenstadt v. Baird, supra,* at 453) and although a physician may charge a fee for an abortion, a woman has a right to terminate her pregnancy (*Roe v. Wade*, 410 U.S. 113). Similarly, the fact

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that a customer pays for sexual services, does not change the constitutional protection for the sexual activities which are involved.

6. The statute, as applied, violates Petitioners' right to the equal protection of the laws embodied in the Fifth Amendment in that only women are prosecuted for solicitation. This unequal application is recognized in the decisions of both courts below in this case and in the appellate court's opinion in *United States v. Wilson*, 342 A.2d 27 (D.C. App. 1975). There the government sought to justify the discriminatory application of the statute by "the scarcity of women undercover officers" and an alleged rule among street walkers is that "the women first must name the act and price." (*Id.* at 29) Such an administrative convenience is entitled to even less deference than the legislation held to violate the Equal Protection clause. See *Reed v. Reed*, 401 U.S. 71, 76 (1971). The Court of Appeals should have inquired into whether there was a compelling state interest which could justify the discriminatory enforcement of §22-2701.

Finally, the police practices discussed above usurp the legislative function by defining the nature of the crime as one committed only by women. This practice which arises from vague laws so inherently arbitrary and discriminatory is in violation of due process. *Papachristou v. City of Jacksonville*, 382 U.S. 87 (1972); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 11, 1975

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DEMETRIA MOSES, CORRINE E. SMITH, TONJA PERRY, JOAN A. ABERNATHY, AND DONNA A. GAINES,

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UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 7042

UNITED STATES, APPELLANT,

v.

DEMETRIA MOSES, CORRINE E. SMITH, TONJA PERRY, JOAN A. ABERNATHY, and DONNA A. GAINES, APPELLEES.

Appeal from the Superior Court of the District of Columbia

(Argued August 28, 1973 Decided May 22, 1975)

Richard L. Beizer, Assistant United States Attorney, with whom *Harold H. Titus, Jr.*, United States Attorney, and *John A. Terry*, *Stuart M. Gerson*, and *Charles D. Pierce*, Assistant United States Attorneys, were on the brief, for appellant.

Marcia D. Greenberger argued on behalf of all appellees. With her on the brief on behalf of appellees Moses and Smith was *Carl R. Fogelberg*. Also on the brief were *Ed Wilhite* on behalf of appellee Perry, *John W. Karr* on behalf of appellee Abernathy, and *Leona Marx* on behalf of appellee Gaines.

Before KELLY, YEAGLEY, and HARRIS, *Associate Judges*.

HARRIS, *Associate Judge*: Each appellee was charged with soliciting for prostitution in violation of D.C. Code

1973, § 22-2701.[1] Motions to dismiss the informations were filed alleging various constitutional infirmities in the statute, both as enacted and as enforced. A hearing was held in the cases of appellees Moses and Smith; there was no hearing on the other cases. Six months later, the trial court issued a 60-page opinion, ruling the statute unconstitutional and dismissing the informations. The government has appealed pursuant to D.C. Code 1973, § 23-104(c). We reverse.

I. The Hearing

The trial court characterized one of the defendants' arguments as follows: "They contend that the statute is discriminatorily enforced against them as women on the basis of their sex."[2] Its conclusion on this issue was stated as follows:

> The practical application of D.C. Code § 22-2701 exclusively against the female offender constitutes a discrimination so unjustifiable as to violate due process notions of equal protection of the laws. These defendants, as members of the class against whom the law is discrimina-

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[1] The statute provides:

> It shall not be lawful for any person to invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading, any person or persons sixteen years of age or over in the District of Columbia, for the purpose of prostitution, or any other immoral or lewd purpose, under a penalty of not more than $250 or imprisonment for not more than ninety days, or both.

[2] The trial court concluded, after a lengthy discussion, that the term "any person" in the statute means any person, rather than "any woman", and hence is acceptably "sex-neutral".

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> torily enforced, may not constitutionally be singled out for prosecution on a basis so arbitrary as their sex. Thus, the court is presented with a situation in which a suspect classification is used as the basis for a determination entailing potential deprivation of liberty for engaging in conduct that is not properly the state's concern. In such a case, fairness demands proof of a compelling state interest; this demand remains unfulfilled. Accordingly, the informations must be dismissed as irreparably tainted with the invidious discrimination of the selective enforcement which produced them.

Those broad statements necessitate a brief description of the hearing which resulted in the record on which they purportedly are based. The hearing on the motions to dismiss was begun by the calling of the only witness to testify. He was Lieutenant George F. Richards, assigned to the Prostitution and Morals Division of the Metropolitan Police Department. The government asked if the witness was an expert in constitutional law. The court responded (although there had been no on-the-record identification of the witness' occupation): "No, he is not an expert witness in constitutional law. He is an expert in prostitution, perversion, pandering and general wrongdoing."

Lieutenant Richards apparently had nothing to do with the arrests of appellees Moses and Smith. The record is silent as to where or how the two women conducted themselves in such a way as to be charged with soliciting for prostitution.[3] In order to dispose of this appeal,

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[3] There are two separate soliciting cases pending against appellee Moses, and one against each of the other appellees.

we shall assume that in some public place (probably on a street or sidewalk), each appellee offered to engage in sexual intercourse for a price. *See United States v. Carson*, D.C.App., 319 A.2d 329, 330 (1974).

The hearing transcript is 45 pages in length, and contains 1,097 lines. Of those, only 195 lines contain testimony by the sole witness (and many of those were simply expressions such as "yes, sir" in response to comments by the court or counsel). The majority of the transcript (65 per cent) is occupied by statements (and questions) by the trial judge.

We note this circumstance because the record does not provide any meaningful support for the trial court's conclusion of discriminatory enforcement. Lieutenant Richards testified: "Each police district has its own vice squad and it varies in number in the territory or the district and they do have a responsibility for prostitution law enforcement along with other vice type criminal offenses." He made it clear that he had no detailed personal knowledge as to how the various districts' vice squads function. Basically, the trial court relied upon its own observations as providing the evidentiary basis for most of the conclusions in its opinion.[1] A grand jury is

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[1] The following exchange is illustrative. Defense counsel asked Lieutenant Richards whether female police officers were being used to arrest men who might be soliciting women to engage in prostitution. Then:

> A. I cannot really say because as I explained earlier the district[s] [have] their own vice operation[s]. I am not sure whether they are using it now. I know they did in the past. My division is not using that technique.
>
> THE COURT: I will tell you why they knocked that off. You got a lot of complaints that it wasn't fair, that you were arresting all the good people from the suburbs. What they really wanted to do was to arrest the nasty

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free to act on the basis of its own knowledge as well as upon evidence presented to it. *See, e.g., United States v. Dionisio*, 410 U.S. 1, 15 (1973). However, a trial court is not. "A judge's private knowledge is entitled to no weight at all." *Wallington Home Owners Association*

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people, the prostitutes. They were the ones that were the cause of all of it on the theory all these good fellows from the suburbs sort of came in here when they were supposed to be working in the office or out late with the fellows. If they happened to roll up the street, that created a lot of embarrassment. They were not the kind of people who were criminals. They did not want to get to them. After they did that, they stopped it and that was the word that filtered back. There were a lot of complaints about that. They were locking up the good people.

[DEFENSE COUNSEL]: That is all I have.

THE COURT: Did you hear any of those complaints?

THE WITNESS: I did not hear any direct complaints, Your Honor, no. There was some opinion expressed that the heart of the problem was the actual commercial prostitute.

THE COURT: Not the customer.

THE WITNESS: Not the occasional customer as you might say.

That exchange provided the record basis for the following statements in the trial court's opinion:

> The Vice Squad of the Third Police District—an autonomous unit unconnected with the Morals Division—did essay an experiment using policewomen as decoys who, upon being solicited for prostitution by male "johns," made arrests under § 2701. The experiment ceased abruptly. Its demise had nothing to do with a dearth of arrestees; on the contrary, the very success of the project signalled its end. The outcry of "respectable" gentlemen from the suburbs, sullied and embarrassed by their encounter with the law, soon reached the responsive ears of the police and the program was abandoned, never to be revived. * * *

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v. Borough of Wallington, 130 N.J. Super. 461, 327 A.2d 669, 672, *aff'd*, 66 N.J. 30, 327 A.2d 657 (1974).

II. The Right of Privacy Issue

As we have noted, the record contains no information as to the specific conduct of the appellees beyond the fact that each was charged with soliciting for prostitution. Notwithstanding that fact, the trial court concluded that § 22-2701 "is an unconstitutional invasion of the right to privacy as comprised in the First, Third, Fourth, Fifth, and Ninth Amendments to the United States Constitution."

Such a conclusion was predicated upon arguments concerning women's "right to the use of their own bodies". It would, of course, be absurd to suggest that a woman who elects (or is induced) to occupy herself as a prostitute thereby forfeits her constitutional rights, including those of privacy. However, there is no basis for concluding that any such issue validly is presented in this case.

We are not confronted here with any adult's private, consensual sexual conduct. Appellees were arrested upon allegedly making solicitations of police officers for prostitution, with the solicitations presumably having been made in some public place. Whatever might have happened had appellees succeeded in their solicitations and engaged elsewhere in some private sexual act for a price is irrelevant. *See United States v. Carson*, *supra* at 331. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Supreme Court stated (at 65-66):

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the con-

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> cept of ordered liberty.'" This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation. [Citations omitted; *cf. Stanley v. Georgia*, 394 U.S. 557 (1969).]

We conclude that the trial court erred in deciding that the statute proscribing soliciting for prostitution is unconstitutional for its allegedly impermissible infringement of appellees' rights to privacy. *See Harris v. United States*, D.C.App., 315 A.2d 569, 575 (1974); *Morgan v. Detroit*, 17 CRIM. L. REP. 2031 (E.D. Mich. Feb. 24, 1975).

III. THE FREE SPEECH ISSUE

In considering this aspect of the trial court's ruling, two concepts should be borne in mind. The first—and that which provides the only marginally plausible basis for the ruling—is that Congress chose not to make "prostitution" a criminal offense.[5] Rather, it sought to control the seemingly ineradicable business by prohibiting soliciting for prostitution. The second is that the act of soliciting for prostitution is *sui generis* when evaluated against the broad spectrum of freedom of speech cases. The great majority of First Amendment cases involve a

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[5] It is unlawful to commit adultery, fornication, or sodomy. D.C. Code 1973, §§ 22-301, 22-1002, and 22-3502, respectively. Virtually any sexual act consummated by a prostitute would fall within one of those categories, but we need not rely upon those provisions in disposing of this appeal.

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true expression of ideas or beliefs, which a solicitation for prostitution is not. Nonetheless, we shall deal with the question in light of existing precedents, although the extent of their applicability is somewhat limited.

Proceeding basically from the proposition that prostitution per se is not unlawful, the trial court reasoned that a prostitute's offer to engage in a commercial sexual act must be protected speech. In part, the trial court relied upon our opinion in *Riley v. United States*, D.C. App., 298 A.2d 228 (1972), *cert. denied*, 414 U.S. 840 (1973). However, such reliance is misplaced.

Riley did not deal with prostitution, but rather with that portion of the statute which prohibits soliciting for "any other immoral or lewd purpose". The attack on that language's constitutionality was based upon assertions of overbreadth and vagueness, as well as upon the argument that the speech involved should be considered to be protected under the First Amendment. We sustained the statute against both of those challenges, recognizing that its applicability has been interpreted to be limited to solicitations to commit sodomy, which itself is a criminal offense. *Riley* had nothing to do with the prohibition against soliciting for prostitution (which manifestly is neither vague nor overly broad). *See also District of Columbia v. Garcia*, D.C.App., 335 A.2d 217 (1975).

The trial court held that the arrests of appellees for mere solicitation, *i.e.*, for "invit[ing], entic[ing], persuad[ing]," or "address[ing] for the purpose of inviting, enticing, or persuading" a person for prostitution violated their rights to free speech. The trial court found that the charge against each appellee was for a "purely verbal" crime, which could be justified only upon a showing of a "compelling" or "subordinating" interest. *See Bates*

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v. Little Rock, 361 U.S. 516, 524 (1960); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 463 (1958). The trial court made an extensive analysis of the asserted interests in regulating such verbal communications, and concluded that they are insufficient to justify criminalizing the speech. Appellees similarly take the position that the relevant societal interests are inadequate to justify the statute. The government, while not contesting the finding that appellees face prosecution for their speech, asserts the validity and strength of the various interests which led Congress to proscribe soliciting for prostitution. We need not involve ourselves in this judgmental dispute (which properly is the function of the legislature), for we conclude that appellees' alleged offers to perform sexual intercourse for a price are not within the bounds of First Amendment protection.

Section 22-2701 proscribes a highly particularized form of speech. It recites no punishable conduct other than inviting, enticing, or persuading, or addressing another, for the purpose of prostitution. *Cf. Cohen v. California*, 403 U.S. 15, 18 (1971); *Stromberg v. California*, 283 U.S. 359 (1931). The speech condemned is not of the type intended or likely to produce imminent lawless action or violence. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969); *United States v. Dellinger*, 472 F.2d 340, 359-60 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Nor does the prohibited speech fall within the realms of opinion on issues, political dissent, enumeration of grievances, social dialogue, or the like. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *cf. Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

Rather, what we are dealing with is a straightforward business proposal which may be regulated under the standards applicable to "purely commercial advertising."

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Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); *see Jamison v. Texas*, 318 U.S. 413, 417 (1943). Appellees' motive in soliciting customers was the sale of their services for economic gain. Certainly self-interest or a profit motive is not enough in and of itself to preclude First Amendment analysis.[6] However, we have here a communication the sole purpose of which is to arrange a purely commercial exchange, *i.e.*, services for money. That type of dialogue is in no sense an attempt to express social concerns or grievances publicly.[7] *See Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 29-30 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974).

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[6] *See Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). *Cf. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973), in which the Court stated:

> If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.

[7] Almost any conduct or communication arguably expresses some message or idea. Here, however, the exposition of any idea is only a minor part of, and incidental to, the communication. The primary thrust is a commercial advertisement. *See Peterson v. Board of Educ.*, 370 F. Supp. 1208, 1213 (D. Neb. 1973).

Prostitution and solicitation therefor may connote (or result from) a reaction to real or imagined social ills, and in that sense may somehow express a desire for adjustments in social policies. *See, e.g.*, N.Y. Times, Feb. 28, 1975, at 1, col. 1. Any consideration of possible root causes of prostitution, however, cannot shield what is fundamentally an intended business transaction from state regulation.

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The prostitute's invitation to commercial sexual intercourse is not an essential part of any exposition of ideas. The conversation's objective is to settle the terms of an intended business transaction, and its content is likely to be wholly confined to the essentials of the bargain. While the record does not describe the solicitations which gave rise to the charges underlying this appeal, some exchange conveying the nature of the act to be performed and the price to be charged is sufficient to constitute an offense under § 22-2701.[8]

We also take note of the interests of the respective participants to a solicitation for prostitution. The interest of the prostitute is to make as much money in as little time as possible, and, therefore, to dispense with unnecessary talk. The interest of the pretended bargainers for the prostitutes' services in these cases was to control crime; in other circumstances, where the would-be purchaser is genuinely in the market, his interest would appear to be to obtain some form of sexual release. Those varying interests (excepting that of the undercover police officer) connote a purely commercial venture in which each party is out solely for herself and himself. *Compare New York Times Co. v. Sullivan, supra* at 266.

Having determined the character of the speech at issue, we next consider whether it is protected by the First Amendment and, if so, to what extent. We conclude that a solicitation for prostitution is not entitled to immunity under the First Amendment. We rely for such a holding on the factors discussed above and on the lines of precedent leading to and stemming from *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). *Pittsburgh Press* is direct: Where the reg-

[8] It is not argued that anything other than the terms of the transaction was discussed.

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ulated expression does "no more than propose a commercial transaction", *id.* at 385, as in *Valentine v. Chrestensen*, *supra*, or is "no more than a proposal of possible employment", as in *Pittsburgh Press*, reasonable regulation is within the permissible exercise of state police power. *Ibid.* The situation before us, like the situations presented in *Valentine* and *Pittsburgh Press*, is a "classic [example] of commercial speech." *ibid.*, and thus is subject to reasonable government regulation.[9] *See Banzhaf v. Federal Communications Commission*, 132 U.S.App. D.C. 14, 33-34, 405 F.2d 1082, 1101-02 (1968), *cert. denied*, 396 U.S. 842 (1969).[10]

Next we examine the statute to see if the prohibition against solicitation is reasonable. Two principal bases are proffered for the argument that the manner of regulation is impermissible. First, it is argued that since prostitution itself is not proscribed, a statute governing speech concerning such activity is unreasonable. As did the United States District Court for the Eastern District of Michigan recently in sustaining the validity of a

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[9] When Congress legislates for the District of Columbia, its power includes all legislative powers which a state may exercise over its affairs. *See Berman v. Parker*, 348 U.S. 26 (1954). Thus Congress possesses the police power of the individual states in limiting solicitation for prostitution in furtherance of societal interests. *See Palmore v. United States*, 411 U.S. 389 (1973).

[10] *See also Barrick Realty, Inc. v. City of Gary*, 491 F.2d 161 (7th Cir. 1974); *Hood v. Dun & Bradstreet, Inc.*, *supra*; *Peterson v. Board of Education*, 370 F. Supp. 1208 (D. Neb. 1973); *Associated Students v. Attorney General*, 368 F. Supp. 11 (C.D. Cal. 1973); *Pent-R-Books, Inc. v. United States Postal Service*, 328 F. Supp. 297 (E.D. N.Y. 1971); *National Organization for Women v. State Division of Human Rights*, 34 N.Y.2d 416, 314 N.E.2d 867 (1974); *Passaic Daily News v. Blair*, 163 N.J. 474, 308 A.2d 649 (1973).

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similar statutory scheme, *Morgan v. Detroit*, *supra*, we disagree. Regulation of business conditions and commercial ventures long has been recognized to be a valid exercise of police power. *See, e.g., McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 488 (1955). As we have stated, this power does not exclude authority to regulate speech when it is purely commercial. *See Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, *supra*. It is incorrect to contend that government is deprived of the authority to regulate a business activity merely because the activity itself is not illegal. *See, e.g., Williamson v. Lee Optical of Oklahoma*, *supra; Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935); *Belli v. State Bar of California*, 519 P.2d 575 (Cal. 1974) (en banc).

Second, appellees contend—and the trial court found—that the asserted societal interests in prohibiting soliciting for prostitution are unsupported by scientific or empirical data, and thus constitute capricious premises for the statute. Additionally, the trial judge was of the opinion that the real purpose of the solicitation statute is to regulate public morality, which he considered to be an impermissible legislative purpose. However, reviewing courts " 'do not demand of legislatures "scientifically certain criteria of legislation." ' " *Paris Adult Theatre I v. Slaton*, *supra* at 60, *quoting Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968), *quoting Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911). The lack of data supporting the statute does not render it invalid: legislatures properly may rely on scientifically unproven assumptions both in the regulation of commercial and business transactions and for the protection of the broad social interest in order and morality. *See Paris Adult*

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Theatre I v. Slaton, supra at 60-61. In the area of the regulation of commercial professions, the Supreme Court has stated that

> . . . the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical of Oklahoma, supra at 487-88. With respect to the maintenance of public morality, the Court similarly has stated:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Paris Adult Theatre I v. Slaton, supra at 63. *See also Roth v. United States*, 354 U.S. 476, 485 (1957).

There is a legitimate national, state, and community interest in maintaining a decent society, *see Paris Adult Theatre I v. Slaton, supra* at 59-60, 63, and the stemming of commercialized sexual solicitations is an acceptable means of furthering this interest. We have no basis for faulting this legislative choice, and take note of the overall statutory scheme enacted by Congress in furtherance

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of such an objective. *See* D.C. Code 1973, §§ 22-2701 through 22-2712.[11]

We observe again that a solicitation for prostitution is a unique type of speech, and quote the following dictum from the Supreme Court's opinion in *Pittsburgh Press*, *supra* (413 U.S. at 388):

> We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.

We conclude that a would-be prostitute constitutionally may be forbidden to solicit customers, and that a would-be customer similarly may be forbidden to solicit a person to engage in prostitution. The First Amendment presents no impediment to § 22-2701's proscription against soliciting for prostitution.

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[11] In the recent past, a number of the other sex-related statutes in the District of Columbia Code have been ruled unconstitutional by the same trial judge. In one such case, a finding of unconstitutionality based on vagueness was affirmed. *District of Columbia v. Walters*, D.C.App., 319 A.2d 332, *appeal dismissed and cert. denied*, 95 S.Ct. 650 (1974). Four other cases necessitated reversal by this court. *See United States v. Montalvo*, D.C.App., No. 7301 (unpublished judgment dated Dec. 13, 1974); *United States v. Dumas*, D.C. App., 327 A.2d 826 (1974); *United States v. Cozart*, D.C. App., 321 A.2d 342 (1974); *United States v. Carson*, *supra*.

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IV. The Equal Protection Issue

An individual's right to equal protection of the laws, guaranteed in the states by the Fourteenth Amendment, is guaranteed in the District of Columbia through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Each appellee is a woman; each has been charged with soliciting for prostitution. Based upon virtually no other facts of record, the trial court concluded that appellees are "members of the class [women] against whom the law is discriminatorily enforced".[12] A comparison of the record with the trial court's opinion (as was done illustratively in note 4, *supra*) reveals that the trial judge ruled essentially on the basis of his own social philosophy. The dismissal of the informations on equal protection grounds also must be reversed.

The dismissal of a criminal charge on the basis of a purported denial of equal protection is not a judgment to be made lightly. As the circuit court stated in *Washington v. United States*, 130 U.S.App.D.C. 374, 382, 401 F.2d 915, 923 (1968):

> Within constitutional limits, legislative power to define crime is absolute, and even the command of equal protection leaves to the lawmaker much leeway to affect separate groups divergently. [Footnotes omitted.]

In *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954), the Supreme Court stated:

> Equal protection does not require identity of treatment. It only requires that classification

[12] The trial court's more expansive conclusion on this subject is quoted on pp. 2-3, *supra*.

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> rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.

The consideration of an equal protection issue in the area of sexual solicitation may not be undertaken superficially. First, § 22-2701 is sex-neutral on its face. Additionally, the statute contains a dichotomy. It prohibits (1) soliciting for prostitution, and (2) soliciting for other lewd or immoral purposes. Far from holding that § 22-2701 applies only to females, this court consistently has held that a male who seeks to sell himself to another male for purposes of sodomy violates this very section of the Code, *e.g.*, *Gaithor v. United States*, D.C.App., 251 A.2d 644 (1969); *Berneau v. United States*, D.C.App., 188 A.2d 301 (1963), although the practice logically has been to charge the female solicitor under the former prohibition and to charge the male solicitor under the latter.

It is not doubted that the major law enforcement efforts in enforcing the statute are directed against the sellers of sex—as is true in the enforcement of the narcotics laws, where sellers are the principal police targets. Yet unquestionably there may be wholly valid reasons for such a circumstance, assuming it to exist. In any event, however, the trial court's finding of discriminatory enforcement is unsupported by the record, and must be set aside.[13]

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[13] The trial judge's opinion reflects his undoubtedly sincere conviction that there should be no prohibition in the Code against soliciting for prostitution. He is fully entitled to such a belief. However, the judgments involved properly are to be exercised by the legislature. While we are obliged to reject

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V. Conclusion

The rulings appealed from are reversed. The constitutionality of § 22-2701 in proscribing soliciting for prostitution is sustained, and the cases of the appellees are remanded with directions that the informations be reinstated.

Reversed and remanded.

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statutes which are unconstitutional, we are equally obliged to honor and sustain those which are valid.

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APPENDIX B

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed May 29, 1975]

No. 7042 January Term, 1975

UNITED STATES,

Appellant,

v.

DEMETRIA MOSES, ET AL.,

Appellees.

17778-72
18338-72-A
21346-72-A
34472-72-A
36618-72-A
39272-72-A

BEFORE: Kelly, Yeagley and Harris, Associate Judges.

ORDER

It is ORDERED, *sua sponte,* that the second sentence of the first full paragraph on page six of the opinion filed herein on May 22, 1975, is amended to read:

> Notwithstanding that fact, the trial court concluded "that § 22-2701 is invalid as an unconstitutional invasion of defendants' rights of privacy . . . ."

It is FURTHER ORDERED, *sua sponte,* that the second sentence of the first full paragraph on page eight is amended to read:

> In support of such a conclusion, appellees rely in part upon our opinion in *Riley v. United States,* D.C. App., 298 A.2d 228 (1972), *cert. denied,* 414 U.S. 840 (1973).

PER CURIAM.

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APPENDIX C

[Filed July 14, 1975]

* * * * *

BEFORE: Reilly, Chief Judge, Kelly, Fickling, Kern, Gallagher, Nebeker, Yeagley and Harris, Associate Judges.

ORDER

On consideration of appellee petition for rehearing en banc and it appearing that no judge of this court has called for a vote thereon, it is

ORDERED that appellees' petition is denied.

PER CURIAM.

Copies to:
Honorable Charles W. Halleck
Judge, Superior Court of the District of Columbia,
Clerk, Superior Court of the District of Columbia.
All Counsel of Record.

APPENDIX D

[November 3, 1972]

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Criminal Division

UNITED STATES OF AMERICA	)	
V.	)	Criminal Nos. 17778-72
DEMETRIA MOSES	)	21346-72
UNITED STATES OF AMERICA	)	
V.	)	Criminal No. 18338-72
CORRINE SMITH	)	
UNITED STATES OF AMERICA	)	
V.	)	Criminal No. 34472-72
TONJA PERRY	)	
UNITED STATES OF AMERICA	)	
V.	)	Criminal No. 36618-72
JOAN A. ABERNATHY	)	
UNITED STATES OF AMERICA	)	
V.	)	Criminal No. 39272-72
DONNA M. GAINES	)	

OPINION

The defendants have been charged with violating Section 22-2701 of the District of Columbia Code.[1] The matter

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[1] Section 22-2701 provides:

"*Prostitution – inviting for purposes of, prohibited.* It shall not be lawful for any person to invite, entice, persuade, (cont'd)

came before the Court on motions by the defendants to dismiss the informations on the grounds that § 22-2701 violates their right to privacy encompassed in the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution of the United States; that the statute abridges their freedom of speech in contravention of the First Amendment to the Constitution; that the discriminatory enforcement of the Statute denies the defendants the equal protection of the laws; and that the statutory penalty for the offense charged constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution.

For reasons set forth below, the Court concludes that D.C. Code, § 22-2701 violates the defendants' rights to privacy, freedom of speech, and equal protection. The motions to dismiss should therefore be granted.

At the outset it must be recognized that the crime contemplated by this statute is a purely *verbal* offense. The defendants have pointed out, and the government has conceded, that the threshold element of this offense is no more than the spoken word. Prostitution *per se* is not a crime in the District of Columbia.[2] As Lieutenant Richards, Chief of the Prostitution, Perversion and Obscenity

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[1] (cont'd)
or to address for the purpose of inviting, enticing or persuading any person or persons sixteen years of age or over in the District of Columbia, for the purpose of prostitution, or any other immoral or lewd purpose, under a penalty of not more than $250.00 or imprisonment for not more than ninety days, or both."

[2] No doubt a fact infrequently realized or even understood by many. See fn. 3, *infra*.

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section of the Metropolitan Police, Morals Division, testified at the hearing on these motions, a consummated act of prostitution would not be prosecuted under § 22-2701 in the absence of a verbal solicitation. It is simply the solicitation itself, the mere exchange of words, which constitutes the offense. Accordingly, the crime for which these defendants were arrested was simply the speaking of certain words to police officers artfully holding themselves out as willing listeners.

It is axiomatic in our Anglo-American jurisprudence that the proper subject of criminal punishment is behavior, not speech. As the Supreme Court said recently in *Gooding v. Wilson,* 450 U.S. 518 (1972), the First Amendment prohibits the States (and *a fortiori* the federal government) from punishing "the use of words or language not within 'narrowly limited classes of speech,' *Chaplinksy v. New Hampshire,* 315 U.S. 568, 571 (1942)." 405 U.S. at 521-522. Since Justice Holmes first enunciated the test in *Schenck v. United States,* 249 U.S. 47 (1919), the issue in every case has been "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52.

The concept underlying this test is not limited to cases of "subversive advocacy." Reversing the conviction under a "breach of peace" statute of one who hurled abrasive epithets at an angry crowd, the Court in *Terminiello v. Chicago,* 337 U.S. 1 (1949), said:

> "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and

> have profound unsettling effects as it presses for the acceptance of an idea. That is why freedom of speech, though not absolute (citing *Chaplinsky*), is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." 337 U.S. at 4.

Words may often have undesirable import for certain members of a large and pluralistic society, but the First Amendment forbids the imposition of any restraint on speech unless the words themselves are tantamount to "substantive evils *that Congress has a right to prevent," Schenck v. United States, supra,* at 52. (Emphasis added.) It is manifest that liberty is a heavy counterbalance in weighing whether an evil is sufficiently grave to warrant its suppression by government. Such censorship may be justifiable when the speech "is directed to inciting or producing imminent lawless action and *is likely* to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (emphasis supplied). This principle is analogous to the common law doctrine that solicitation to commit a crime may itself be punished, for the solicitation merges with the action.

Nor does the First Amendment work an automatic bar to the regulation of speech which, in the words of the United States Court of Appeals for this Circuit,

> "creates a substantial risk of provoking violence, or . . . is, under contemporary community standards, so grossly offensive to members of the public who actually overhear it as to amount to a nuisance."

> *Williams v. District of Columbia,* 136 U.S. App. D.C. 56, 64; 419 F.2d 638, 646.

But the threshold for invoking such restrictions is high, commensurate with the value of the freedoms at stake. Concurring in *Eisenstadt v. Baird,* a recent case treating the same fundamental issue now before us (the scope of constitutional protection for sexual activity), Justice Douglas delineated the permissible range of speech:

> *"The First Amendment protects the opportunity to persuade to action whether that action be unwise or immoral, or whether the speech incites to action.* See, e.g., *Brandenburg v. Ohio,* 395 U.S. 444; *Edwards v. South Carolina,* 372 U.S. 279; *Terminiello v. Chicago, supra."* 405 U.S. 438, at 459 (1972) (emphasis supplied).

Even speech which is obscene under current standards may not constitutionally be subject to a wholesale prohibition. *Stanley v. Georgia,* 394 U.S. 557 (1969); *Williams v. District of Columbia, supra.*

Speech must directly engender a concrete evil, such as a criminal act, a breach of the peace, or a public nuisance, before it loses the protection of the First Amendment. See, e.g., *Gooding v. Wilson, supra; Cohen v. California,* 403 U.S. 15 (1971); *Coates v. Cincinnati,* 402 U.S. 611 (1971); *Edwards v. South Carolina,* 372 U.S. 229 (1963); *Williams v. District of Columbia, supra.* In applying this standard to the statute and the charge in the instant case, the Court must determine what concrete evil "which Congress has a right to prevent" may be generated by the speech here penalized.

Prostitution *per se* is not a crime in the District of Columbia,[3]

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[3] The first statutory control over prostitution in the District of Columbia came on July 29, 1892, when Congress passed "an act for the preservation of the public peace and protection of property within the District of Columbia." Act July 29, 1892, ch. 320, 27 Stat. 322. Section 7 of that Act (27 Stat. 323) made it unlawful for "any prostitute or lewd woman to invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading any person or persons . . . for the purpose of prostitution . . . .". Section 7 of the 1892 Act was specifically repealed on August 15, 1935, when Congress passed "an act for the suppression of prostitution in the District of Columbia." Act August 15, 1935, ch. 546, 49 Stat. 651, 652. This new Act (Section 1) broadened the scope of the offense set forth in Sec. 7 of the 1892 Act in several areas: the persons covered shifted from "any prostitute or lewd woman" to "any person"; the offense was extended to cover not only solicitation for the purpose of prostitution, but also "any immoral or lewd purpose"; the maximum penalty was increased; and provisions were added for suspension of sentences and rehabilitation. See D.C. Code Sec. 22-2703. Section 1 of the 1935 Act has been amended twice. Act June 9, 1948, ch. 428, title I, Sec. 102, 62 Stat. 346; Act June 29, 1953, ch. 159, Sec. 202(b), 67 Stat. 93. The changes brought about by these amendments relate primarily to limiting the age (to persons sixteen years of age or over) of solicitation and increasing the maximum penalty for solicitation. The legislative history of D.C. Code Sec. 22-2701 as well as the plain meaning of the words make it clear that the statute under which defendants are charged prohibits *soliciting* prostitution. Various sections in the D.C. Code attempt to cover other activities related to prostitution. See, e.g., Sec. 22-2705 (Pandering Act) making it unlawful to induce or compel a female to become a prostitute or engage in prostitution; Sec. 22-2707 prohibiting the act of procuring a female to live in prostitution; Sec. 22-2709 and Sec. 22-2710 making it illegal to procure or force a female to engage

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nor has it ever been.[4] Accordingly, the common law doctrine of solicitation sanctioned by the First Amendment cannot justify D.C. Code § 22-2701. While solicitation to commit a crime may properly be proscribed, it would be anomalous to punish someone for soliciting another to commit an act which is itself not a crime, and that is precisely what is involved here.

It has been suggested, however, that the completed act of prostitution, while not in itself criminal, necessarily entails fornication, sodomy, or adultery, or some combination thereof, each of which is presently a crime in the District of Columbia. See D.C. Code §§ 22-1002, 22-3502, and 22-301, respectively. Thus, so the argument runs, solicitation for prostitution may properly be viewed as an inchoate offense leading to the substantive offenses of fornication, sodomy, or adultery. Accepting *arguendo* the suggestion that solicitation for prostitution may be characterized as solicitation for these "criminal" offenses, we must then consider whether these acts are in fact "substantive evils that Congress has a right to prevent." Such a determination must first be made in order to reach the basic issues posed by the instant prosecutions.

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[3] (cont'd)
in acts of prostitution; Sec. 22-2711 declaring unlawful the procuring of a female for the immoral enjoyment of a third person; Sec. 22-2712 prohibiting the operation of a house of prostitution staffed by female prostitutes.

[4] Nor should it be: the right of privacy, discussed *infra*, applies equally to acts of prostitution, as to other consensual sexual behavior between adults in private.

Upon examination of the relevant law, this Court concludes that the statutory proscription against fornication, sodomy, and adultery engaged in by consenting adults is an unconstitutional invasion of the right to privacy as comprised in the First, Third, Fourth, Fifth and Ninth Amendments to the United States Constitution. Since the privacy doctrine is a critical basis for the constitutional claims here asserted, it must of necessity be considered here in some depth.

The right to privacy encompasses the Constitutional right of the individual to control the use and function of his or her own body. This principle found eloquent expression in a Supreme Court opinion handed down over eighty years ago in *Union Pacific Railway Co. v. Botsford,* 141 U.S. 250 (1891):

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 141 U.S. at 251.

More recently, the Supreme Court in *Griswold v. Connecticut,* 381 U.S. 479 (1965), located the source of "zones of privacy" immune from governmental encroachment in the penumbras of specific guarantees of the Bill of Rights, "formed by emanations from those guarantees that help give them life and substance." 381 U.S. at 484. In the *Griswold* case, the Court held that the state's regulation of access to contraception information and methods violated the right to privacy protected by the Constitution. *Griswold* adjudicated claims involving a married couple;

and, as a result, the opinion was couched in terms of marital, as well as sexual, privacy. But the Court has subsequently made it clear that the mantle of inviolability thrown around personal intimacy and bodily integrity was not meant to protect only married persons:

> "If the right of privacy means anything it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion. . . ." *Eisenstadt v. Baird,* 405 U.S. 438 at 453 (1972) (emphasis in original).

Judicial respect for the right to privacy has not been confined to the specific issues surrounding the use of various contraceptive methods. In *Stanley v. Georgia, supra,* the Supreme Court declared unconstitutional a state statute making criminal the mere private possession of so-called "obscene" materials. The Court observed that any justifications that might obtain for other statutory regulation of obscenity could not support this interference with one's right to personal choice in the selection of materials for private reading or viewing. The attempt to censor the books or films that an individual may consume in private for his own satisfaction was adjudged a patently unconstitutional effort "to control the moral content of a person's thoughts." 394 U.S. at 565 (footnote omitted). The Court concluded that the First Amendment, one of the great specific sources from which the right to privacy derives its contours, *Griswold v. Connecticut, supra,* at 484, prohibits such governmental intrusion into the realm of personal privacy. *Stanley v. Georgia, supra* at 564.

As the government may not dictate personal tastes in reading and viewing matter, neither may it abridge the

individual's right to associate with whomever he chooses and to enjoy privacy in those associations. *N.A.A.C.P. v. Alabama,* 357 U.S. 449 (1958). These rights, scrupulously guarded when asserted on behalf of political organizations, have recently been vindicated in federal court decisions dealing with unconventional social associations and living arrangements. In *Moreno v. Department of Agriculture,* 345 F Supp. 310 (D.C. D.C. 1972), a three-judge court found that a Congressional enactment denying foodstamps to needy households consisting of unrelated persons violated the rights to privacy and freedom of association. The law apparently was designed to prevent "hippie communes" from having the benefit of the foodstamp program, regardless of objective standards of need. The District Court recognized that such an attempt to regulate nontraditional living arrangements is inconsistent with fundamental values of privacy and personal autonomy.

Another District Court in an analogous holding declared that a police department could not constitutionally deny employment as a police officer on the sole ground that the applicant was a practicing nudist who gathered with fellow nudists on weekends. That some may consider nudism "repulsive and vulgar" was deemed insufficient to warrant the police department's practical intrusion into the applicant's right to associate with persons of his choice. *Bruns v. Pomerleau,* 319 F. Supp. 58 (D. Md. 1970). Similarly, the District Court for the District of Columbia applied the rights of privacy and free association to shield an individual's unorthodox sexual activity from governmental scrutiny. In *Ulrich v. Laird,* ___ F.Supp. ___, 40 U.S.L.W. 2165 (1971), the court ordered the security clearance of an avowed homosexual restored despite his refusal to answer intimate questions about his sex life.

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These and analogous cases illustrate the expanding judicial invocation of the right to privacy in matters of intimate personal preference. In effecting this expansion, the courts have taken cognizance of dramatic changes in social conditions that have made legal doctrines once appropriate grow unsuited to contemporary society. Cf. *Plessy v. Ferguson,* 163 U.S. 537 (1896) and *Brown v. Board of Education,* 347 U.S. 483 (1954); and see also *Franklin v. State,* 257 So.2d 21 (Fla. 1971), at 23, and *Abele v. Markle,* 321 F. Supp. 800 (1972). An ever-widening range of activities involving the individual's right to bodily integrity and self-determination have been found by the courts to lie within the sheltered "zone of privacy." Much of this protected behavior naturally concerns sexuality, traditionally an area of special intimacy. Recognizing the need to keep such personal conduct free from outside interference, courts have been steadily broadening the scope of legal protection for individual sexual matters. This evolution is unmistakable; it mirrors the growing jealous regard for personal autonomy in an increasingly intrusive urbanized society. In *Doe v. Scott,* 321 F. Supp. 1385 (1971), a three-judge court summarized *Griswold's* progeny as follows:

> "We cannot distinguish the interest asserted by the plaintiffs in this case from those asserted in *Griswold* . . . . We believe that *Griswold* and related cases establish that matters pertaining to procreation, as well as to marriage, the family, and sex are surrounded by a zone of privacy which protects activities concerning such matters from unjustified governmental intrusion." 321 F. Supp. at 1389-1390.

In light of contemporary beliefs and conditions, the sexual activities of consenting adults, married and single, must now be seen inexorably to reside within the protection of the right to privacy.

The recognition of the right to privacy in current case law represents the vindication of principles enunciated more than a hundred years ago by the philosopher and libertarian, John Stuart Mill:

> ". . . the only principle for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is emanable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.[5]

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[5] John Stuart Mill, *On Liberty*, Chapter I (1859).

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Mill's formula, permitting governmental interference with the individual's conduct only when that conduct harms others, is reflected in the constitutional standard declaring that government may not inhibit the exercise of fundamental rights, such as the right to privacy, unless such restriction is clearly necessary to the accomplishment of some compelling state interest. Justice Goldberg reiterated this test in his concurring opinion in *Griswold:*

> "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.' *Bates v. Little Rock,* 361 U.S. 516, 524. The law must be shown necessary, and not merely rationally related, to the accomplishment of a permissible state policy. (citations omitted)." 381 U.S. at 497.

The compelling state interest test is a stringent standard, not satisfied by equivocal demonstrations of potential harms, nor even by relatively pressing concerns. Even where a considerable state interest exists, recent court decisions striking down statutes prohibiting abortions have amply illustrated that such interests must be substantial indeed to overcome the strong rights of privacy and personal autonomy which our society recognizes with regard to sexual matters. See, e.g., *Abele v. Markle,* II, _____ F.Supp. _____ (D. Conn., September 20, 1972) (Civ. No. B-521); *Abele v. Markle* I, 342 F. Supp. 800 (D. Conn.,

April 18, 1972); *Poe v. Menghini,* 339 F.Supp. 986 (D. Kan., 1972); *Y.W.C.A. v. Kugler,* 343 F.Supp. 1048 (D. N.J., 1972); *Doe v. Scott,* 321 F.Supp. 1385 (N.D. Ill., 1971), appeal docketed, 401 U.S. 969 (April 6, 1971); *Roe v. Wade,* 314 F.Supp. 1217 (N.D.Tex., 1970). All of the foregoing cases were decided by three-judge federal panels. See also *Babbitz v. McCann,* 310 F.Supp. 293 (E.D.Wis., 1970), appeal dismissed, 400 U.S. 1 (1970); and *California v. Belous,* 80 Cal. Reptr. 354, 458 P.2d 194 (1969).

Various conjecturable purposes have been adduced for the maintenance of anti-abortion statutes. For example, surgical abortion procedures, like any operation, may involve some medical risk. Moreover, although there is a great deal of moral and ethical disagreement on the issue, there is at least an arguable state interest in regulating medical actions which terminate the human gestation process. Pronatalist groups still loudly assert the supposed rights of the fetus or embryo. Nevertheless, the courts have held that even these interests, which have substantially more strength than any interest that can be advanced to justify the regulation of private sexual conduct between consenting adults, are insufficient to justify denying a woman the right to determine whether to bear children. It thus becomes important to ask whether infringement of the privacy of consenting adults engaged in any of the sexual conduct now under examination is essential to the effectuation of some overriding state interest. Absent a strong showing of such interest, the abridgement of these personal liberties is intolerable.

This Court is unable to perceive any current compelling interest to justify the criminalization of fornication, sodomy,

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or adultery. The government advances none. On the contrary, the almost complete lapse of enforcement of the laws against such consensual behavior demonstrates the government's own recognition that no indictable public evil is occasioned by these acts. One need only compare the thousands of divorces granted each year on proof of adultery with the nearly total absence of criminal prosecutions for that offense to perceive the atrophy of such laws. Lieutenant Richards of the Morals Division testified that he cannot recall a single prosecution for fornication or adultery since he joined the force. Moreover, a recent policy statement of the Metropolitan Police directs that arrests be discontinued for acts of sodomy between consenting adults in private.[6] It is incontrovertible that the criminal statutes proscribing fornication, adultery, and sodomy have been drastically eroded, at least as applied to acts between consenting adults in private. In light of the privacy doctrine, of course, this is a fortunate decay. The Court finds the observations of a contemporary scholar particularly apposite to this phenomenon:

> "Ever since the first two Kinsey reports ... revealed an incredibly wide gap between the law's expectations and the people's actual practices as to sexual conduct, the law of sexual offenses has lost its major crutch: popular support. The population flouts the law; it thereby indicates its

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[6] A consent order to the same effect was issued by the District Court in a recent civil proceeding; D.C. Code § 22-3502 is no longer to apply to private consensual acts of sodomy between persons over age sixteen. *Richard Schaefers, et al. v. Jerry Wilson, et al.* (D.C. D.C., May 24, 1972)_____F.Supp._____(Civil No. 1821-71).

> dissatisfaction with it. A law without popular support cannot be effective."[7]

In view of the sexual revolution of the past decade, the almost universal availability of contraceptive devices, and the proliferation of "alternative life styles," it is incongruous to assert a compelling governmental interest in restricting voluntary sexual conduct to Victorian confines. In fact, no such overriding interest has been demonstrated.

Since fornication, adultery, sodomy, and similar consensual sexual behavior by adults are properly within the protected "zones of privacy," with no compelling state interest to warant their criminalization, they are not "substantive evils that Congress has a right to prevent." Therefore, they may not be used to justify a prohibition on words spoken to solicit their performance. This Court does not choose to presume caprice on the part of the government, however. Continuing prosecutions for soliciting prostitution (in the absence of enforcement of these other sexual prohibitions) therefore suggest a governmental belief that within the context of prostitution, these otherwise innocuous activities entail consequences sufficiently harmful to generate an overriding interest in their restriction. Yet beyond the bald assertion that soliciting prostitution is "malum in se," the government has suggested no evil precipitated by the sexual activities of the prostitute and customer so compelling as to warrant suppression of conversation leading to the completion of these voluntary acts.

In applying the strict "compelling state interest" test, it is unnecessary to consider all conceivable interests that

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[7] Mueller, *Legal Regulation of Sexual Conduct* (1961), at 16-17.

might exist, although not shown by the government and which might have been the actual object of the legislation. Nonetheless, even though the government has proffered no other justifiable state interest in placing a statutory prohibition on solicitation for prostitution, the Court has considered other potential interests which have been discussed by counsel for defendants as well as widely treated in various publications. An examination of the most ubiquitous of these claims follows.

The lore of the harms occasioned by prostitution is as pervasive in our culture as it is unsubstantiated by hard data. Indeed, as Jerome Skolnick has said of this area of legislation, "rather than fact determining policy, policy decides fact."[8]

Nowhere does this assessment seem more apposite than in the alleged threat posed to community health by prostitution. Even prescinding from the argument that it is a citizen's right to choose not to protect his own health, we are still cited to nothing which supports the proposition that sexual relations between prostitutes and their clients pose any unique threat to the health and well-being of either party. Over a decade ago, it was remarked in a United Nations publication that "(T)he prostitute ceases to be the major factor in the spread of venereal disease in the United States today."[9] This general conclusion has

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[8] "Coercion to Virtue: The Enforcement of Morals," 41 *So. Cal. L. Rev.* 588, 599 (1968).

[9] "Prostitution and Venereal Disease," 13 *Internat'l. Rev. of Crim. Policy* 67, 69, October 1958.

been firmly ratified by knowledgeable physicians and investigators in the field of public health. Because research has so consistently negated the primacy of prostitution in the transmission of venereal disease, and because the popular belief to the contrary is nevertheless held with the tenacity usually invested in notions born of dogma rather than of science, let us pause to consider the evidence.

Following her comprehensive study of prostitution in Seattle, Professor Jennifer James of the University of Washington School of Medicine observed that:

> "Public Health advisors believe that prostitutes are well-educated about venereal disease problems and are watchful for them. They are aware of preventive techniques which include using prophylactics, checking customers, and seeking medical care, because a reputation as one who is infected would cut down the relatively large volume of repeat business which most prostitutes depend on."[10]

Dr. James further remarks, in a conclusion shared by many of her colleagues, that "Public Health advisors believe that the increase in venereal disease is related more to a general change in sexual values unaccompanied by health education. . . ."[11] Dr. William M. Edwards, Jr., Chief of the Bureau of Preventive Medicine, Nevada State Health Division, recently concurred in this view, saying:

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10 Jennifer James, Ph.D., and E. Joseph Burnstin, Jr., Esq., "Prostitution in Seattle," *Washington State Bar News* (August-September 1971), at 8.

11 "Prostitution in Seattle," *supra*, at 8.

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> "The problem isn't in the house of prostitution; it's out in the general population . . . . Prostitutes are much more alert to the possibilities of infection and get examined very frequently."[12]

Dr. Edwards further indicated that the venereal disease rate among prostitutes is less than five per cent (5%), while among high school students age 15-19, the rate is twenty-five per cent (25%). Dr. R. Palmer Beasley of the University of Washington School of Public Health and Community Medicine similarly averred that "(m)ost venereal disease spread is not between prostitutes and their customers. Probably ninety per cent (90%) of venereal disease is unrelated to prostitution." Dr. Charles Winick of C.C.N.Y. and the American Social Health Association, co-author of *The Lively Commerce* (New York, 1972), was even more conservative in his estimate:

> "We know from many different studies that the amount of venereal disease attributable to prostitution is remaining fairly constant at a little under five per cent (5%), which is a negligible proportion compared to the amount of venereal disease that we have."[13]

Statistics promulgated by the Public Health Service of the United States Department of Health, Education and Welfare further document the minor role of prostitution in spreading venereal disease:

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12 Dr. William Edwards, Jr., statement in the Honolulu *Star-Bulletin,* March 23, 1972, p. B-8.

13 "Should Prostitution Be Legalized?", *Sexual Behavior,* January 1972, at 72.

> "In the United States during the 12-month period ending June 30, 1971, less than three per cent (3%) of more than 13,600 females diagnosed with infectious syphilis were prostitutes."[14]

In Seattle during the three-year period preceding 1971, during which time all women arrested as prostitutes were medically examined, no more than one or two out of hundreds were found to have infectious syphilis and fewer than six per cent (6%) were infected with gonorrhea.[15] Meanwhile, the gonorrhea rate increased fivefold among residents of Prince George's County, Maryland, in the last decade; and quadrupled in Arlington, Virginia, between 1969-1970 alone.[16]

The viewpoint of the experts may easily be corroborated inferentially; for while the highest rate of venereal disease exists in the age group 15-30 (comprising eighty-four per cent (84%) of all reported venereal disease cases), the age group which most frequents prostitutes is 30-60 (seventy per cent (70%) of "johns" in Seattle).[17] Nor is this age pattern for prostitutes' clientele by any means peculiar to Seattle, as other portraits of typical patrons

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[14] Department of Health, Education and Welfare, Public Health Service, June 1, 1972; per J.D. Millar, M.D., Chief, Venereal Disease Branch, Center for Disease Control, Atlanta, Georgia.

[15] "Prostitution in Seattle," *supra*, at 8.

[16] *Newsweek*, January 24, 1972, at 46.

[17] "Prostitution in Seattle," *supra*, at 8.

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will readily attest.[18] As Robert M. Nellis of the San Francisco City Clinic succinctly put it: "Prostitution is not where it's at with V.D. today; it's Johnny next door and Susie up the street."[19, 20]

Moreover, the present practices of the criminal justice administration system in the District of Columbia do not serve to inflate this Court's estimation of the compelling state interest in prohibiting solicitation in order to staunch the spread of venereal disease. Women arrested

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18 See, e.g., Harry Benjamin, M.D., and R.E.L. Masters, *Prostitution and Morality,* (1964); Winick and Kinsie, *The Lively Commerce,* (1972).

19 *Newsweek,* January 24, 1972, at 46.

20 The progress of medical research in the development of prophylactic drugs for venereal diseases deserves at least passing comment here. While some degree of effective venereal disease prophylaxis can be achieved by regular weekly injections of penicillin, as has been done for some years now in certain foreign countries which medically regulate prostitutes (see, e.g., 13 *International Review of Criminal Policy, supra),* recent A.S.H.A.-sponsored experiments in Nevada testing a new compound, Progonasyl, have had extremely optimistic results. Prophylactic use of the drug (which is also an effective contraceptive) by prostitutes in the State-licensed houses of prostitution resulted in a "significant reduction" of the venereal disease rates, especially for gonorrhea, by far the more common disease. ("A Study of Progonasyl Using Prostitutes in Nevada's Legal Houses of Prostitution," W.M. Edwards, M.D., Chief, Bureau of Preventive Medicine, Nevada State Health Division, and Richard S. Fox, April 13, 1972.)

Thus, whatever state interest may be said to reside in controlling prostitution for the purpose of diminishing venereal disease may soon be eliminated.

for soliciting prostitution in the District of Columbia, whether released on bond or citation or committed to the Women's Detention Center, do not routinely receive V.D. tests. (Interestingly enough, though, they are tested for current use of illegal drugs). They are returned to the community untreated for venereal disease if they are infected, despite their arrest under a statute, one of the ostensible purposes of which is to control the spread of venereal disease. If the hazards are not great enough to warrant medical inspections of arrestees, it is tautological to assert that criminalization of the conduct for the purpose of averting those hazards is an unwarranted infringement of liberty, especially in light of the fundamental rights involved.

Even were this Court persuaded that prostitution is a major source of the proliferation of venereal disease, it is patently clear that this harm could be controlled by a more narrowly drawn statute, one not abridging privacy and personal liberties as does a total prohibition of soliciting. Other nations have long had schemes requiring prostitutes to register with health authorities, to have regular medical examinations, or to comply with other health regulations. In most of the counties of Nevada prostitution is legal in state-licensed houses with provision for medical maintenance. It is not this Court's purpose to encourage prostitution nor to advocate any such scheme of regulation; it is sufficient to note that whatever state interest in entailed here can adequately be protected by means short of prohibition of soliciting and the attendant deprivation of constitutional rights.[21] In light of

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21 "The consensus of opinion in this matter seems to have been best stated by Flexner in 1914 who said (in his (cont'd)

the foregoing, the hypothetical public health rationale for § 2701 must fail.

It is important to consider another potential government allegation, not here made but frequently advanced, and also wholly unsupported by any evidence in these cases, that banning solicitation can be constitutionally justified because prostitution is often linked with organized crime. Again we confront a proposition whose popular acceptance has survived long after the actual conditions which it may once have described. The Presidential Task Force Report on Organized Crime addresses itself directly to this question:

> "Prostitution . . . plays a small and declining role in organized crime's operations . . . Prostitution is difficult to organize, and discipline is hard to maintain. Several important convictions of organized crime figures in prostitution cases in the 1930's and 1940's made the criminal executives wary of further participation."[22]

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21 (continued)
classic work *Prostitution in Europe)* that the treating of venereal disease is a health matter falling outside the ambit of the police and can best be served by adequate health facilities and an intensive program of public education." The Correctional Association of New York, "Governmental Attitude and Action Toward Prostitution," (November 1967), at 6.

22 "Presidential Commission on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime," p. 4 (1967); cited in The Challenge of Crime in a Free Society, 189 (1967).

Other writers in the field accord with this view. Dr. Charles Winick observes that ". . . nowadays prostitution . . . is too visible an activity for organized crime – it's too dangerous. Therefore, organized crime has pretty much gotten out of the prostitution business."[23] As another scholar added, ". . . organized crime has more lucrative and less perilous enterprises available to it."[24] These views were reiterated within the particular context of the District of Columbia by Lieutenant Charles Rinaldi in an interview conducted while he was chief of the Morals Division of the District of Columbia Metropolitan Police:

> "There is no real organization of call girls here in Washington. Maybe there's a loose network, but only infrequently do you find one pimp with a couple of girls working for him. The Mafia isn't around here. . . Anyway, prostitution just isn't profitable enough in Washington to keep any organization interested."[25]

The San Francisco Committee on Crime injects another dimension to the analysis:

> "It is also probable that if prostitution were not a crime, it would not be organized. In any event, a law enforcement policy of sweeping prostitutes

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23 "Should Prostitution Be Legalized?", *Sexual Behavior, supra,* at 72.

24 T.C. Esselstyn, "Prostitution in the United States," 376 *Annals of the American Academy of Political and Social Science* 123 (March 1968), at 127.

25 5 *Washingtonian* (August, 1970) at 43.

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> off the streets and into our courts is no way to keep organized crime out of prostitution."[26]

The Committee is presumably alluding to the need for structure and organization generated by the efforts necessary to elude detection and combat legal prosecution. In such a situation, otherwise private entrepreneurs are forced toward alliances with underworld syndicates for "protection," while the attendant occasion for police corruption grows in ominous proportion.

Another important perspective on the problem is suggested by Professor Kinsgley Davis:

> "Prostitution has probably declined as underworld business in America; not only have demand and supply slackened, but other activities, such as labor-union control, have proved immensely profitable and easier to organize."[27]

While this Court naturally expresses no view on the relationship of organized crime with organized labor, it is a conceivable affiliation no less logically plausible than that of organized crime and prostitution. However, one would expect to find few serious proponents of the abolition of labor unions in order to prevent their potential domination by criminal syndicates. Courts have, in fact, long held that society should regulate illegal conduct directly, rather than prohibit other activities on the ground that

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26 "The San Francisco Committee on Crime: A Report on Non-Victim Crime in San Francisco," Moses Laski and William H. Orrick, Jr., Chairman, (June 3, 1971) at 32.

27 "Prostitution," *Contemporary Social Problems*, (New York, 1961) at 262.

those activities are somehow, in some cases, connected with illegality. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972); *Stanley v. Georgia,* 394 U.S. 557 (1969).

Accordingly, even if prostitution were closely connected to organized crime, which a careful investigation demonstrates is not the case in this jurisdiction, this Court could not properly support an absolute prohibition of constitutionally protected conduct in order indirectly to suppress proscribed activity. This rationale too must fail.

Closely allied with the foregoing alleged state interest in prohibiting solicitation of prostitution is the endeavor to inhibit crimes which may somehow be ancillary to prostitution. By restricting prostitution, so the theory goes, one may also minimize the occurrence of related crimes against the person or property of either consenting party. While the logic of this analysis seems sound, the evidence is less than conclusive.

The Seattle study remarks bluntly that:

> ". . . prohibition of prostitution itself causes crime. . . . The prohibition . . . has a double impact. To the extent that prostitutes believe their victims will not report a robbery or theft they will be encouraged to commit it. Further, prostitutes, more than occasional victims of assaults by customers,[28] are also discouraged from

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[28] A major study of prostitutes in Seattle during 1970-71, using statistically valid sampling techniques, revealed that more than seventy-six per cent (76.1%) of all female prostitutes were injured while working; sixty-four per cent (64%) of these by customers,

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involving the law."[29] (footnote supplied.)

Thus attachment of the stigma and penalties of the criminal law to basically innocuous consensual conduct may actually deter application of such sanctions to genuinely harmful behavior.

Nor is the alternative simply resignation to the criminal activity which may arise in conjunction with prostitution any more than to the crime which may be ancillary to the vending of goods or the practice of law. The San Francisco Committee on Crime was admirably direct in meeting this issue:

> "Bearing in mind the financial limits on public resources available to combat crime, this is a poor area to apply 'consumer protection' against the consumer's own gullibility. The answer to prostitution-connected force, violence, or theft is that it is chargeable and punishable as a separate crime, independent of any act or solicitation of prostitution.[30]

Stated most baldly, "(I)f prostitutes or pimps rob or beat patrons, the victims should charge robbery or bodily harm,

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28 (continued)
twenty per cent (20%) by police, and sixteen per cent (16%) by pimps. Dr. Jennifer James, "A Formal Analysis of Prostitution in Seattle: Final Report," Part 1-B (Department of Psychiatry, School of Medicine, University of Washington, 1971).

29 "Prostitution in Seattle," *supra*, at 7-8.

30 "The San Francisco Committee on Crime: A Report on Non-Victim Crime in San Francisco," *supra*, at 29.

not prostitution."[31] It goes without saying that the prostitutes should also be free to charge robbery or bodily harm against patrons; they ought not to be deprived of protection of life and property simply because of their chosen "profession."

Furthermore, it is not clear that crimes commonly associated with prostitution are primarily attributable to the prostitutes themselves. The San Francisco Committee on Crime rejects such a notion, saying:

> "(I)n short, society's effort to prevent crimes of violence associated with prostitution would be more effective by concentrating law enforcement efforts on the pimps rather than on the girls, on the "associated crimes" rather than prostitution."[32]

Nor does a proscription of soliciting indirectly accomplish control of the pimps; on the contrary, the intrusion of the criminal law greatly augments the typical prostitute's need for a pimp and his corresponding power to author wrongdoing.

If the evidence in this area of inquiry is less than conclusive, the law is not. To arrest and criminally prosecute a prostitute because of a possibility that crime-related activity might be involved directly or indirectly is massively antithetical to traditional concepts of due process, equal protection, and individual liberty. The Supreme Court

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31 "The Politics of Prostitution," *The Nation* (April 10, 1972) at 463.

32 "The San Francisco Committee on Crime: A Report on Non-Victim Crime in San Francisco," *supra,* at 29.

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recently voided a Florida vagrancy statute which made similar assumptions about the criminal propensites of certain classes of people. In *Papachristou v. City of Jacksonville, supra,* Justice Douglas wrote for a unanimous Court:

> "A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards – that crime is being nipped in the bud – is too extravagant to deserve extended treatment. Of course, they are nets making easy the round-up of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as to the rich, is the great mucilage that holds society together." 405 U.S. at 171.

Within a context of the right to privacy and First Amendment freedoms, the Court in *Stanley v. Georgia, supra,* reached an analogous conclusion concerning prohibition of protected behavior to prevent possible related harms. A state

> ". . . . may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit the possession of chemistry books on the ground that they

may lead to the manufacture of homemade spirits." 394 U.S. at 565.

If indeed there is evidence that prostitution is sometimes coincident with certain crimes, there is also ample indication that the extension of the criminal law to soliciting significantly hinders application of legal sanctions to those very crimes. By the most fundamental precepts of our law, it is to those violent acts that such sanctions must directly be addressed. Endorsement of an alleged state interest which precisely inverts this proscriptive emphasis would be a perversion of justice in which this Court will not acquiesce. The rationale fails with its predecessors.

The only other rationale advanced by the government to justify the regulation of speech involved in § 22-2701 is the alleged need to keep prostitutes off the street. Such a contention is utterly unsatisfactory because if there is nothing illegal about being a prostitute or engaging in prostitution, the state naturally has no constitutional right to prohibit prostitutes from appearing in public. The government urges, however, that conversations aimed at contracting for sexual activities somehow harrass the public at large. Consequently, a careful consideration of the various aspects of this argument is in order.

It must be observed initially that the government has offered no evidence beyond unverified conjecture that anyone is in fact subjected to unwanted solicitation by prostitutes. In these cases, the policemen holding themselves out as potential customers seeking solicitation can scarcely claim to have been offended or harrassed by any conversation their subterfuge elicited. The Court of Appeals for the District of Columbia Circuit has approved

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the principle that the police officer, by virtue of his training and position, is less free than the ordinary citizen to complain of supposedly offensive language. That Court noted with approbation the distinction drawn by the Model Penal Code between "offensively coarse utterances" which create a "public" annoyance, and instances of offensive language whereby "it is only the policeman's peace and quiet that are allegedly disturbed." Model Penal Code § 250.1, Comment at pp. 13, 17 (Tent. Draft No. 13, 1961), cited in *Williams v. District of Columbia, supra,* at 64-65, n.25.

Nor can it be assumed that private citizens have been subjected unwillingly to language they find grossly and patently offensive. Even if the phrase identified by Lieutenant Richards at the motions hearing as the common enticement used by prostitutes when they take the initiative[33] can be characterized as grossly offensive under contemporary community standards, *Williams v. District of Columbia, supra,* at 64, there is no evidence that prostitutes harrass the disinclined public with it. In fact, it is well known that, at least in Washington, D.C., prostitutes rarely approach anyone unless that person has given indications – some subtle, some scarcely so – that he (or she) wishes to be approached. Potential customers who purposefully seek out the areas frequented by prostitutes are easily recognizable, especially to one whose livelihood depends upon it. Public solicitation by the prostitute is generally limited to these less-than-reluctant listeners.

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33 "Are you sporting?"

Yet even if we were to accept the government's undocumented supposition that some uninterested passersby are accosted and offended by persons soliciting for prostitution on the public streets, that fact alone would not warrant the sweeping prohibition proscribed by this statute. As the Supreme Court said in *Cohen v. California, supra,* at 22:

> "(o)f course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971)."

Furthermore, today's citizen is bombarded with unwanted solicitations from every quarter, even though he be mildly vexed or massively annoyed by them. Street hawkers, door-to-door hucksters, and garish neon salutation besiege us; ubiquitous "muzak" follows us from supermarket to dentist's office. We cannot even turn on the radio in our own home or apartment without a barrage of jingles trying to "entice or persuade" us to buy some product that will give us "sex appeal." We must accept the sheer annoyance of these endless, mindless appeals, although they be as offensive to some persons as the prostitute's pitch on Fourteenth Street may be to those of other more delicate sensibilities.

The Supreme Court has warned that merely because some persons in fact deem a particular form of expression offensive, that in itself is not sufficient to justify a thoroughgoing prohibition of such language. The Court eloquently reminds us that:

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> "(I)t is . . . often true that one man's vulgarity is another man's lyric. Indeed we think it is largely because governmental officials cannot take principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California, supra,* at 26.

Where a verbal solicitation does so offend the sensibilities of any citizen that he or she feels moved to violent reaction – a situation surely not shown to obtain here – a more narrowly drawn statute can afford the offended individual an adequate remedy. For example, D.C. Code § 22-1121, making it unlawful to provoke a breach of the peace by acting in such a manner as to annoy, disturb, obstruct or be offensive to others, focuses narrowly on the problem of the individual grieviously offended by certain language without trampling the rights of those who do not find such conversation inflammatory. An additional advantage of this or some alternative "disorderly conduct" statute is that, consonant with the teaching of *Cohen,* the individual citizen as complainant ascertains the offense, rather than permitting reliance on a police officer specifically detailed to make arrests, and whose quality of performance is measured by the number of successful prosecutions flowing from his efforts.[34]

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[34] See this Court's recent opinions in *United States v. Kenneth Binns, et al,* Cr.No. 14119-70, at p.15, and *District of Columbia v. Clarence Norfleet, et al,* Cr.No. 71214-71, at p.3, for an analysis of the applicability of the disorderly conduct statute in similar situations.

Perhaps more importantly, § 22-2701 has in no way incorporated the distinction which the Supreme Court repeatedly has drawn between public and private impingements upon the right to be let alone. One may invoke the aid of government to safeguard his home from the intrusion of unwanted and offensive forms of expression; yet he cannot intrude his own tastes upon the general public by demanding suppression of all expression personally distasteful to him. In *Public Utilities Commission v. Pollak,* 343 U.S. 451 (1952), the Court upheld the prerogative of the D.C. Transit Company to pipe radio broadcasts aboard its buses despite the protests of certain passengers who asserted invasion of their privacy and peace of mind. The Court said:

> "However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance." 343 U.S. at 464.

Similarly, in *Rowan v. Postmaster General,* 397 U.S. 728 (1970), while validating a governmental scheme to facilitate exclusion from the home of mailed materials found offensive by the householder, the Court also stressed that "we are often captives outside the sanctuary of the home and subject to objectionable speech." 397 U.S. at 739. Cf. *Cohen v. California, supra,* 403 U.S. at 25. As with so many rights, a balance must be struck between the freedom of one party to be undisturbed and the freedom of another to express himself. Neither is absolute.

D.C. Code § 22-2701 fails conspicuously to weigh in most of the primary factors relevant to striking this

crucial balance. The statute makes no distinction between situations where the words spoken to solicit prostitution are spoken to a presumably willing police officer or to an unwilling private citizen; where their expression offends no one and where it threatens a breach of the peace; where they are spoken in public or in private. All these determinations are essential to a decision whether the solicitation, even if bothersome, is one which the government may constitutionally regulate.

Above all, the statute clearly sweeps too broadly beyond the regulation of speech endorsed by the First Amendment; its absolute prohibition of words spoken in any context to solicit for prostitution is impermissible.

> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button,* 371 U.S. 415, at 433.

This Court perceives that whatever governmental interests might reside in the control of solicitation for prostitution could adequately be preserved by statutory regulation far short of complete prohibition. In an effort to cure this constitutional defect, one possible modification of the Section might involve application of the statute only to public solicitation. This assumes that some adequate definition of "public" could be fashioned. The tenuousness of this assumption is pointed up by *In re Davis,* 51 Cal. Rptr. 702 (Cal.App. 1966). The defendant in *Davis* modeled a topless bathing suit before 150 adults in a restaurant-bar. She was convicted of violating a statute making it a crime to "wilfully and wrongfully" commit any act "which openly outrages public decency." The California

appellate court found the statute to be unconstitutionally vague. In the course of its opinion the court noted that:

> ". . . there is the problem of what is meant by 'public decency.' Does the word 'decency, refer merely to bad manners or to immoral conduct or, more specifically, to immoral conduct with overtones of sex, eroticism or nudity? Does the term an 'act * * * which openly outrages public decency' refer to conduct decent and moral when done in private, but not when in public; or conduct indecent or immoral, or both, even if private, which outrages the 'public' whether done in private or public? Finally, even if we decide which attitude of the public, the moral or the decorous, is the one which must be outraged, there is the question 'who is the public'?. . . That answer is a great deal easier to give in a homogeneous society, in times of well established precepts of morality and manners, such as Victorian England, than today. . . . When the statute speaks of 'public decency' does it presuppose some kind of consensus among the majority of the public as to what is and what is not 'decent' and, if that assumption is wrong, to which segment of the public is the trier to look?" 51 Cal.Rptr. at 706-707.

Cf. this Court's recent opinion holding a somewhat similar District of Columbia statute to be unconstitutionally vague, *District of Columbia v. Norfleet, et al.*, Cr.No. 71214-71, at p.5. Moreover, the Court notes, for reasons set forth in Part II of this opinion, a statute limited in its application to public solicitation could raise perilous questions of equal protection since it is well known, and the record

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established, that it is the poor female prostitutes, those coming from racial minority groups, who commonly "work the street," and are arrested, while higher priced call-girls ply their trade in hotels, apartments, and other less public situations without arrest. Given this problem, the Court is particularly reluctant to undertake judicial amendment of § 22-2701 by ruling that it applies only to public solicitation. In any event, it is scarcely arguable that such modification, even absent equal protection snares, could save the statute from its other First Amendment deficiencies. Accordingly, taking the language of the Section at its literal meaning it is clear that on its face and as applied, § 2701 suffers from a fatal quantum of overbreadth (as distinguished from a question of vagueness), infringing constitutional freedoms.[35]

The inordinate overextension of this statute, so disproportional with any of the potential evils occasioned by solicitation for prostitution, contributes to the inevitable deduction that the government's primary concern here is to suppress prostitution because it is "immoral." Having reached what this Court believes to be the central, if tacit, state interest in these cases, it must now consider the broad question of the right of secular government to regulate public morality.

The government contends that the state has the obligation and right to encourage upright and moral behavior

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[35] *Hawkins v. United States*, 105 A.2d 250 (D.C.Mun.App. 1954) provides little guidance, and does not compel a holding contrary to the one this Court makes. *Hawkins* blurred over the constitutional issue as one involving vagueness under Amendment V, and purported to *state and decide* the question in just four sentences.

on the part of its citizens. Prescinding from the obvious dilemma of choosing which of a host of conflicting ethical theories to promulgate (and who is to make the choice), affirmation of governmental power to legislate morals is fraught with hazards. Upon the acceptance of such a view, the state may ultimately be given the right to regulate everything. Indeed, there is little human conduct that could not be invested with moral implications; thus the sphere of permissible state regulation could soon devour all personal liberties in the name of community morality. But who shall be the final arbiter – Billy Graham or Billy Sunday, Carl McIntyre or Karl Marx? This Court is convinced that the proper perspective on regulation of public morals was enunciated by the well-known Wolfenden Report:

> "Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[36]

The equivalence of crime with sin is surely not tenable in light of the privacy doctrine which we have been discussing. If the right to privacy has any viable meaning, it cannot be defeated by a mere assertion that the state has the right to regulate "immoral" conduct even though that conduct is not shown to hurt anyone. The advocacy of ethical theories is not synonymous with the demonstration

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[36] Committee on Homosexual Offenses and Prostitution, Report, CMD. No. 247 (London, 1957) at 24.

of concrete societal harms. This Court concurs with Mill and Hart in insisting that it is only the latter which would justify a court's finding of an evil sufficient to warrant dilution of liberties. "So long as others are not harmed, we . . . justly deserve freedom, even the freedom to be immoral."[37] Upon thorough examination of the evidence pertinent to state claims (both stated and implied) of the harms caused by prostitution, the Court is satisfied that they are spurious. The only injury which actually is traceable to consensual acts of prostitution between adults is the sense of indignation spawned in certain other persons. This so called harm is not of an order cognizable by the law. Absent showing of a concrete evil that government has a right to prevent, prostitution, like other consensual sexual activity, is not a fit matter for proscriptive legislation. The Court agrees that "sexual acts or activities accomplished without violence, constraint, or fraud, should find no place in our penal codes."[38] Soliciting for prostitution in the District of Columbia is such an uninjurious activity; this perception, coupled with the constitutional rights here at stake, precludes the criminalization of this verbal behavior demanded by § 2701.

It must also be observed that criminalization of "immoral" behavior collides with other difficulties in its

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[37] Robert N. Harris, Jr., "Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 *U.C.L.A. L. Rev.* 581, 603 (1967).

[38] Rene Guyon, "Human Rights and the Denial of Sexual Freedom," *Sex and Censorship*, Mid Tower, San Francisco, undated; cited in *Prostitution and Morality*, *supra*, at 366.

drive to eradicate the universe of undesirable conduct.

> "The criminal code of any jurisdiction tends to make a crime of everything that people are against, without regard to enforceability, changing social concepts, etc. . . . The result is that the criminal code becomes society's trash bin. The police have to rummage around in this material and are expected to prevent everything that is unlawful. They cannot do so because many of the things prohibited are simply beyond enforcement. . . ."[39]

This Court is reminded of the estimate by Kinsey and his associates that were all the laws concerning sex crimes rigidly enforced, ninety-five per cent (95%) of the male population would at one time or another be in a penal institution.[40] To attempt thoroughgoing enforcement of the ban on soliciting prostitution in the District of Columbia would be an enterprise almost equally ambitious, costly, and impracticable. The Court is further convinced that evidence cannot be adduced to show that enforcement efforts under § 2701 make any significant progress toward the elimination of solicitation for prostitution in this city. Naturally, it transcends the Court's province to make legislative determinations. The Court ventures these explorations simply to suggest the great morass of problems which one

[39] Presidential Commission on Law Enforcement and the Administration of Justice, Task Force Report, (March 13, 1967); cited in Skolnick, "Coercion to Virtue," *supra*, at 628.

[40] Kinsey, Pomeroy, and Martin, *Sexual Behavior in the Human Male*, *supra*, at 392.

encounters in the attempt to regulate an area so broad and nebulous as public morals. For present purposes it suffices to examine the impact of such regulatory efforts upon the exercise of constitutional rights.

This Court finds that a generalized belief that certain conduct is immoral is no substitute for a showing of governmentally cognizable harms caused by that conduct. Solicitation for prostitution may be activity that some, even many, in this community find morally reprehensible. Nonetheless, absent any demonstrated tangible harms emanating from this activity, particularly none sufficiently compelling to justify an abridgement of the fundamental rights involved here, the Court concludes that § 22-2701 is invalid as an unconstitutional invasion of defendants' rights of privacy and free speech.

II

The defendants also challenge the constitutionality of their prosecution under this statute on the grounds that such prosecution denies them the equal protection of the laws. The defendants present two major arguments to support this claim. They contend that the statute is discriminatorily enforced against them as women on the basis of their sex. They further argue that a lesser standard of proof than is required to convict a man for homosexual solicitation is arbitrarily permitted in prosecutions of female prostitutes, thus denying them equal protection on the basis of their gender. It is not necessary to reach the latter contention, for an examination of the charge of discriminatory enforcement reveals that this claim independently warrants a dismissal of the information against the defendants.

In 1935, Congress repealed the 1892 Act which had governed prostitution,[41] and replaced it with what is now D.C. Code § 22-2701.[42] Where the old statute had made it unlawful for "any prostitute or lewd woman" to solicit for prostitution, the new version penalizes "any person" who so solicits, thus apparently making irrelevant the sex of the solicitor. Defendants have suggested that the primary intention of Congress was not the egalitarian goal of eliminating sexual bias in the law, but rather the imposition of harsher punishment on female prostitutes than had been authorized under the earlier statute. They point out, for example, that the sex-specific language of the other statutes dealing with prostitution-related offenses has been retained, giving rise to the inference that, in Congress' view, only women can be prostitutes, only women can commit prostitution, and only women can solicit for prostitution.[43]

If the statute must be construed to mean that it applies only to females who initiate sexual transactions of the kind in question, then it creates a distinction among those capable of committing the acts depending solely on the

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41 Act, July 29, 1892, ch.320, 27 Stat. 323.

42 49 Stat. 651, ch. 546, § 1 (1935).

43 See, e.g., D.C. Code § 22-2705: "Pandering-Inducing or compelling *female* to become prostitute or engage in prostitution"; D.C. Code § 22-2706: "Compelling *female* to live life of prostitution against her will"; D.C. Code § 22-2707: "Procurer . . ." – one who receives money for "causing any female . . . to engage in prostitution, or any other immoral act"; D.C. Code § 22-2708: "Punishment for causing *wife* to live in house of prostitution." (Emphasis supplied.)

sex of the offender. The use of the words "any person," however, suggests that the criminal penalty was meant to apply to anyone regardless of gender who initiates such a transaction. Even if the statute is thus to be construed as sex-netrual on its face, its deliberate enforcement only against the female prostitute to the exclusion of other possible offenders would likewise constitute a discriminatory enforcement against female offenders on the sole basis of their sex. In either case, a classification by sex is made the grounds for differentiating among potential violators of the statute.

It is necessary to consider, then, what standard is to be applied to determine whether such discrimination by sex violates constitutional guarantees of equal protection. While the Equal Protection clause of the Fourteenth Amendment does not by its terms apply to actions of the federal government, it is well settled that the Due Process clause of the Fifth Amendment exacts as high a standard of fair dealing and equal treatment from the federal authority as the Fourteenth Amendment requires of the states. See, e.g., *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Schneider v. Rusk,* 377 U.S. 163 (1964); *Bolling v. Sharpe,* 347 U.S. 497 (1954). Reference to the standards employed to establish whether discriminatory treatment by a state constitutes a denial of equal protection is thus helpful in determining whether the instant discrimination on the basis of sex is "so unjustifiable as to be violative of due process," *Bolling v. Sharpe, supra,* 347 U.S. at 499.

Two standards of review have been developed to test the constitutionality of a discriminatory classification.[44]

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[44] See *Developments in the Law–Equal Protection,* 82 Harv. L. Rev. 1065 (1969).

The more permissive standard requires only that the discriminatory classification bear some reasonable relationship to a valid state interest. See, e.g., *Morey v. Doud,* 354 U.S. 457, 465 (1967).[45] However, when the discrimination affects "fundamental rights or interests," e.g., *Harper v. Virginia Board of Elections,* 383 U.S. 663, 670 (1966) (poll tax required as condition of franchise), or when the government classifies on a basis "inherently suspect," the discriminatory policy will be subject to "the most rigid scrutiny," *Korematsu v. United States,* 323 U.S. 214, 216 (1944). The government in such cases bears the burden of demonstrating that its classification is necessary to some overriding governmental purpose. See, e.g., *Loving v. Virginia,* 388 U.S. 1, 8-9, 11 (1967); *McLaughlin v. Florida,* 379 U.S. 184, 196 (1964).

The group of classifications deemed suspect includes, for example, race and lineage, e.g., *Korematsu v. United States, supra;* alienage, e.g., *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948); and poverty, especially in connection with the exercise of the franchise, *Harper v. State Board of Elections, supra,* or the effectuation of rights in the criminal process, *Douglas v. California,* 372 U.S. 353 (1963) and *Griffin v. Illinois,* 351 U.S. 12 (1956). However, the Supreme Court has yet to treat classifications

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[45] See also, e.g., *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920):

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair substantial relationship to the object of the legislation, so that all persons similarly situated shall be treated alike." 253 U.S. at 415.

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made on the basis of sex as "suspect." Indeed, just a little over thirty years ago, the view prevailed that the legislature could draw "a sharp line between the sexes," *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948). Statutes singling out women for special treatment were historically justified by uncritical reference to time-worn homilies about the proper place of women in the home.[46]

Similarly, at one time it was settled doctrine that the Constitution permitted differential treatment of the races. *Plessy v. Ferguson,* 163 U.S. 537 (1896). But the Supreme Court has "not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Levy v. Louisiana,* 391 U.S. 68, 71 (1968). It would, of course, be unthinkable today to allow the color of a person's skin to determine whether he receives equal treatment at the hands of government.

Just as maturing concepts of fair and equal treatment led to the realization that racial discrimination has no place in our society, so the notion that woman's traditional role may justify an indulgent review of sex-biased discrimination has been emphatically rejected by state and lower federal courts in recent years.[47] Decisions

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[46] See, e.g., Mr. Justice Bradley's concurring opinion in *Bradwell v. Illinois,* 83 U.S. 130 (1872), in which the Justice found the practice of law unsuited to women, who were fitted by nature and divine ordinance solely to fulfill "the noble and benign offices of wife and mother." 83 U.S. at 141.

[47] See, e.g., *Abbott v. Mines,* 411 F.2d 353 (6th Cir. 1969) (unconstitutional to exclude women from jury in civil case concerning cancer of male genitals); *Kirstein v. Rectors and Visitors of*

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reflecting social and economic conditions or legal and political theories of an earlier era no longer control our approach in appraising whether a particular classification violates the Equal Protection Clause. As the Supreme Court said in *Harper v. Virginia Board of Elections, supra:*

> "(T)he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of

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47 (continued)
University of Virginia, 309 F. Supp. 184 (E.D. Va., 1970) (three-judge court) (women may not be excluded from prestigious branch of state university); *Cohen v. Chesterfield County School Board,* Civ. Action No. 678-79-R, E.D. Va. (Richmond Division), May 17, 1971 (regulation requiring female teacher to leave in the fifth month of her pregnancy violates her right to equal protection); *Seidenberg v. McSorley's Old Ale House,* 317 F. Supp. 593 (S.D.N.Y. 1970), 308 F. Supp. 1253 (S.D.N.Y. 1969) (exclusion of women patrons from liquor-licensed place of public accommodation violates Fourteenth Amendment); *U.S. ex rel. Robinson v. York,* 281 F. Supp. 8 (D. Conn. 1968) (differential sentencing laws for men and women constitute invidious discrimination" against women in contravention of Fourteenth Amendment); *Karczewski v. Baltimore and Ohio R.R. Co.,* 274 F. Supp. 169 (N.D. Ill. 1967) (wife constitutionally entitled to same right as husband to sue for loss of consortium); *Paterson Tavern and G.O.A. v. Borough of Hawthorn,* 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from employment as bartenders); *Commonwealth v. Daniel,* 430 Pa. 642, 243 A.2d 400 (1968) (differential sentencing laws for men and women held unconstitutional).

> fundamental rights (citations omitted). Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." 383 U.S. at 669-70 (Emphasis in original.).

Cases such as *Bradwell, supra,* upholding sex-based discrimination by facile reference to Victorian pieties should properly be regarded as "museum pieces."[48]

Last term the Supreme Court began to strike down state laws which discriminate against women, indicating that it is no longer willing to uphold such unequal treatment on the basis of outmoded and unsupported assumptions about woman's proper place. In *Reed v. Reed,* 404 U.S. 71 (1971) the Court unanimously invalidated an Idaho statute that gave precedence to men over women in the granting of letters of administration. Reversing its traditional deference to sex-biased legislation, the Court declared sex to be a classification "subject to scrutiny under the Equal Protection Clause," 404 U.S. at 75. Mere administrative convenience could not justify the statute's discriminatory preference for members of one sex over members of the other, and the law was found to be "the very kind of arbitrary choice forbidden by the Equal Protection Clause," *id.* The Court in *Reed* was able to reach this result without resorting to the stricter test that would be required were sex considered a suspect classification. Subsequently, in *Stanley v. Illinois,* 405 U.S. 645 (1972), the Supreme Court held that an Illinois statutory scheme violated the Equal Protection Clause in denying unwed

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[48] Freund, "The Equal Rights Amendment is Not the Way," 6 *Harv. Civ. Rights* and *Civ. Lib. L. Rev.* 234, 236 (1971).

fathers the right to a hearing on their fitness to have custody of their illegitimate children, a right enjoyed by the female parent. In *Stanley,* as in *Reed,* application of the more permissive "reasonable relationship" test proved sufficient to invalidate the sex-based discrimination involved in the legislative choice. Thus, while the Court no longer looks with an uncritical eye upon classifications based on gender, it has not yet had occasion to rule that classifications based upon sex require the more stringent standard applied to suspect classifications.

The Supreme Court of California, however, has affirmed that the time has come to treat sex-based classifications with the same rigid scrutiny applied to discriminations based upon race, ancestry and indigency. In *Sail'er Inn v. Kirby,* 95 Cal. Rptr. 399, 285 P.2d 529 (1971), that court explicitly denominated sex a suspect classification, and consequently held unconstitutional a California statute excluding women from employment as bartenders. The California court reviewed the traits common to those classifications which have warranted extraordinary judicial watchfulness, and concluded, as does this Court, that classifications on the basis of sex deserve the same careful scrutiny.[49]

Three characteristics in particular seem to be shared by the classifications which have earned special treatment as "suspect." First, as the court noted in *Sail'er Inn:*

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[49] The California Supreme Court appears to have relied heavily upon the excellent analysis presented in *Developments in the Law – Equal Protection,* noted above.

> "Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth." 95 Cal. Rptr. at 340.

Distinctions between persons on the basis of factors over which they have no control, such as their gender, are "odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943).

In addition, membership in a suspect class "frequently bears no relation to ability to perform or contribute to society," *Sail'er Inn v. Kirby, supra,* 95 Cal. Rptr. at 340. Thus, for example, "(w)ealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process," *Harper v. Virginia Board of Elections, supra,* 383 U.S. at 668. Similarly, the wide range of professions and accomplishments of women today refutes the erstwhile notion that woman's abilities and interests are limited to the domestic sphere.

Finally, relegating an entire class to an inferior status without considering the characteristics and capabilities of its individual members, *Karczewski v. Baltimore and Ohio R.R. Co., supra,* 274 F. Supp. at 179, reflects the stigma of inferiority associated with suspect classifications. *Sail'er Inn v. Kirby, supra,* 95 Cal. Rptr. at 340. The stereotype that blacks were fit only for servile menial jobs, and actually preferred their dependent position in society, is similar to the stereotype that women are weaker than men, intellectually and emotionally as well as physically, and desire the dominion and protection of males. In both cases, a myth of inferiority has been perpetuated, resulting in the arbitrary exclusion of members

of one race or sex from equal participation in societal benefits and responsibilities. As the Supreme Court of California aptly observed, "(t)he pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage," *ibid.* Since sex, like race or ancestry, is a trait over which a person has no control, and which bears no relation to individual capabilities, it must be regarded as an inherently suspect classification for the purposes of equal protection review. Accordingly, the government in defending its presumptively invidious discrimination bears "a very heavy burden of justification." *Loving v. Virginia, supra,* 388 U.S. at 9.

This burden is even greater where, as here, the discrimination affects cherished personal liberties such as the freedom of speech and the right to privacy. The imposition of criminal liability upon members of one sex for their participation in a verbal negotiation for a private sexual transaction constitutes nothing less than a penalty for the exercise of rights guaranteed by the Constitution. The rights to free speech and privacy are contingently infringed by prosecution under this statute. The statute works a more direct deprivation, however. Persons convicted under this section are subject to possible confinement in a penal institution, an infringement of liberty of the most radical sort.

> "Among the rights protected by the Constitution, next to life itself, none is more basic than liberty . . . . No punishment which a state may impose weighs more heavily than imprisonment in an institution." *Robinson v. York, supra,* 281 F. Supp. at 16.

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The Supreme Court has warned that, in reviewing a criminal statute which embodies discrimination on a basis inherently suspect, "where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause . . ." *McLaughlin v. Florida, supra,* 379 U.S. at 192.

Thus we are dealing with a prohibition which is enforced discriminatorily against members of suspect classification, resulting in the deprivation of fundamental liberties. None but the most urgent governmental interests can serve to justify such a policy. In determining whether D.C. Code § 22-2701 violates the guarantee of fair treatment implicit in the Fifth Amendment Due Process Clause, either on its face or as enforced, the Court must exercise the most rigorous scrutiny.

It has been noted above that while D.C. Code § 22-2701 appears by its terms to apply equally to members of both sexes, it is entirely plausible that Congress did not mean by its use of the phrase "any person" to include anyone other than the female prostitute within the statutory prohibition. To the extent that Congress may have intended to retain the former scope of the statute, and thus limit the class of potential offenders to women who invite men to engage in acts of prostitution with them, even the seemingly sex-neutral § 22-2701 must be considered a denial of equal protection. Any construction of the statute to single out only the female prostitute for criminal penalties in connection with the formation of contracts for sexual activities violates the most fundamental principles of fairness. There is nothing unique to the female negotiating such an arrangement with a male that justifies penalizing her

while exculpating other persons who may initiate such transactions.

The notion that only a female can commit prostitution, and only by selling her favors to a man, perpetuates the myth of the "fallen woman" which has molded societal response to these issues. Abraham Flexner, an early investigator of prostitution, notes that "as a matter of history . . . (t)he harlot has been branded as an outcast and flung to the wolves; she alone, never the man, her equal partner in responsibility."[50] By consigning the female prostitute to a class by herself, a class of "untouchables," society creates a voluptuous icon who becomes the collective scapegoat; her persecution becomes expiation and exculpates those whose participation in her brand of sin is less visible.[51] Her symbolic significance impedes rational perception of her role and her rights.

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50 Flexner, *Prostitution in Europe* (1914), at 107.

51 In *In Re Carey*, 57 Cal. App. 297 (1922), the rhapsodies of a California court well portrayed an attitude that continues to pervade official and non-official perspectives on the prostitute:

> "The fallen woman alone carries on the traffic (in prostitution). If others prey upon her frailty, it is only with her cooperation – willing or unwilling. . . . The casual observer cannot fail to see a vast difference between fallen women as a class and the balance of the human kind. They stand apart. No other body of malefactors constitute so distinctly a class as do the fallen women. . . . In truth, from the standpoint of public health, they are sometimes referred to as pestilential and their places of abode as pest houses." 57 Cal. App., at 304.

For a contemporary criticism of this view, see, e.g., *Susan Brownmiller*, "Speaking Out on Prostitution," in *Notes From the Third Year* (1971).

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The belief that females who initiate sexual contracts with consenting adult males behave in any significant way differently from the frequent male initiator of such arrangements reflects insupportable social fictions. It must be reiterated that emerging constitutional principles of privacy make it highly improbable that the government has the authority to suppress such private arrangements at all.[52] But even were the Court to assume *arguendo* that this type of consensual behavior may constitutionally be prohibited, no reason has been advanced, and none may be found, to distinguish between the female who engages in such transactions with men, and the other possible combinations of participants who make analogous arrangements.

Certainly, where the crime lies solely in the solicitation, as here,[53] and not in the act itself, even if the law could permissibly focus on the particular couple of female prostitute and male customer, it could not constitutionally punish the female for a verbal enticement while leaving the male free to make such advances with impunity. Lieutenant Richards testified at the hearing that to make out a case sufficient to sustain an arrest under § 2701, the constitutive component is the tender of an offer evidencing certain terms of the proposed agreement. Thus the

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52 See Part I of this opinion, *supra*, and see also the opinion of this Court in *United States v. Kenneth Binns*, Cr. No. 14119-70.

53 Again, it is assumed *arguendo* that the Constitution does not bar the government from penalizing this purely verbal act despite the guarantees of the First Amendment. Such an assumption is doubtful. See Part I of this opinion and the *Binns* case, *supra*.

crime, if there is one, is purely verbal; either party can commit the central element if he or she initiates the transaction by making an offer.

To condition criminal liability entirely upon an arbitrary and unrelated factor such as the sex of the offender flies in the face of the most basic requirements of equal protection. An analogous situation of arbitrary discrimination was struck down by the Supreme Court in *Skinner v. Oklahoma*, 316 U.S. 535 (1941). In that case, a state statute provided for compulsory sterilization of "habitual criminals," so designating persons convicted three times of felonies involving "moral turpitude," but excepting those convicted of embezzlement and related crimes. Embezzlers, no matter how many times convicted, or how hardened in their criminal proclivities, escaped totally imposition of the severe impairment of personal liberty and bodily integrity implicit in forced sterilization. The Court found this differentiation repugnant to the Equal Protection Clause:

> "The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws.' *Yick Wo v. Hopkins*, 118 U.S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." 316 U.S. at 541.

If § 2701 applies to females but not to males who have committed "intrinsically the same quality of offense," it makes just such an invidious discrimination, and on the basis of an inherently invidious classification as well.

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Statutes providing for differential punishment of offenders merely on the ground of their gender have been found to violate the principle of equal treatment in a manner of lower court decisions in recent years. See, e.g., *United States ex rel. Sumrell v. York*, 288 F. Supp. 955 (D. Conn. 1968); *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968); *Commonwealth v. Daniels*, 430 Pa. 642, 243 A.2d 400 (1968); *Pennsylvania v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969). In these cases, while members of both sexes could be convicted of the crimes for which the petitioners were sentenced, females were subject to the threat of a longer period of incarceration than prescribed for males for the same offense. The Pennsylvania Supreme Court in *Commonwealth v. Daniels, supra*, striking down that State's differential sentencing system for female offenders, observed:

> "In particular, we fail to discern any reasonable or justifiable difference or deterrents between men and women which would justify a man being *eligible* for a shorter maximum prison term than a woman for the commission of the same crime. . ." 243 A.2d at 403 (emphasis in original).

Nor does this Court discern any special factor of deterrence or other distinguishing element which might justify the exemption of a man from liability for soliciting the sexual transactions here in issue, while subjecting a woman to possible imprisonment and/or fine if she performs the same verbal offense. If arrest and criminal prosecution are seen to function at all as deterrents to recidivism, it seems likely that the application of these sanctions to the male patron would have at least as much efficacy in

light of probable socioeconomic status and attendant class reactions.

In the cases at bar, were the statute construed as retaining the original applicability to female offenders only, it would entail a differential imposition of penal liability (on the basis of sex) similar to the unequal punishments found unconstitutional in cases such as *Skinner, Robinson,* and *Daniels, supra.* If the Court were constrained to construe § 2701 as requiring such an invidious discrimination, the Court would have no choice but to find the statute invalid on its face. But, as noted above, a potentially saving construction may be inferred from the statute's sex-neutral language. Under this interpretation of the section, it is not now necessary to find D.C. Code § 22-2701 on its face a violation of equal protection principles.

Defendants have raised another contention, however, which places the constitutionality of these prosecutions in grave doubt. Defendants urge that, despite the neutral wording of the statute, it is enforced with deliberate discrimination against women, causing the same unconstitutional denial of equal protection entailed had the statute by its terms singled out women for exclusive punishment. Ever since the leading decision of the Supreme Court in *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), it has been clear that a government cannot do by administration what it could not do by legislation:

> "Though the law itself be fair on its face and impartial in appearance, yet if it be applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons

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> in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at 373-4.

It cannot be questioned that law enforcement officials do not, by virtue of their office, acquire license to exercise their authority in an arbitrary fashion.

It is now settled law that a defendant in a criminal prosecution may raise as a defense the discriminatory enforcement of the statute against him as member of a particular class. See *Oyler v. Boles,* 368 U.S. 448, 456 (1962); *Edelman v. California,* 344 U.S. 337, 359 (1959); *Ah Sin v. Wittman,* 198 U.S. 500, 506 (1905). See also *United States v. Steele,* 461 F.2d 1148 (9th Cir. 1972); *United States v. Gebhart,* 441 F.2d 1261, 1265 (6th Cir. 1971); *Washington v. United States,* 130 U.S. App. D.C. 374, 401 F.2d 915 (D.C. Cir. 1968); *Moss v. Hornig,* 314 F.2d 89, 92 (2nd Cir. 1963). These cases indicate that, while some selectivity in law enforcement is not in itself a violation of the constitutional rights of defendants, where the decision to pursue the particular group of defendants is "deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification," *Oyler v. Boles, supra,* 368 U.S. at 456, their prosecution is tainted with invidious discrimination, and may be quashed. Defendants may prevail in their claim that unequal administration of the statute against them violates the principles of equal protection upon a showing of "systematic or intentional discrimination" in the enforcement of the law against them. *Edelman v. California, supra,* 344 U.S. at 359.

The Court now examines the evidence in support of defendant's allegation that the law enforcement agencies

of the District of Columbia pursue purposeful policies of discrimination in the application of §2701. In order not to find the section invalid on its face, the Court has already determined that the words "any person," defining potential offenders, must be given their literal asexual meaning. The Court is convinced, however, that the conscious and deliberate policy of the Metropolitan Police and the United States Attorney is the enforcement of § 2701 exclusively against female prostitutes, completely neglecting the potential liability of certain groups of males similarly situated. An analysis of classes of probable offenders will be briefly deferred; at this juncture it suffices to observe that police efforts to apprehend and prosecute persons violating the proscription against soliciting prostitution are directed solely to the female offering her sexual services for a consideration, and to no other persons soliciting "for the purpose of prostitution."

At the hearing upon these motions, Lieutenant Richards testified that the customary way of making prostitution arrests under § 2701 involves the use of a police officer "decoy," wearing plainclothes and using an unmarked car, who cruises or strolls areas known to be frequented by female prostitutes and endeavors to be the recipient of a solicitation. As the Lieutenant's testimony confirms, all the officers composing the Prostitution, Perversion, and Obscenity squad are male. Indeed the membership of that squad has been exclusively male. The Vice Squad of the Third Police District – an autonomous unit unconnected with the Morals Division – did essay an experiment using policewomen as decoys who, upon being solicited for prostitution by male "johns," made arrests under § 2701. The experiment ceased abruptly. Its demise had nothing to do with a dearth of arrestees; on the contrary, the very success

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of the project signalled its end. The outcry of "respectable" gentlemen from the suburbs, sullied and embarrassed by their encounter with the law, soon reached the responsive ears of the police and the program was abandoned, never to be revived.[54] Thus the entire effort of the Metropolitan Police to enforce the ban on soliciting prostitution is aimed at females; males, whether patrons or prostitutes, are free to violate the law with impunity simply because of their gender.

The evidence further indicates that this police policy is shared by the prosecutorial authorities. The language of the Information charging the offense of soliciting prostitution is a blunt example of this discriminatory orientation. The printed form explicitly uses the female personal pronoun when referring to solicitation for prostitution, with the male pronoun reserved for charging soliciting for lewd and immoral purposes.[55] This usage does not indicate a proper apprehension of the neutral meaning of the statute, although it appears that it does reflect the beliefs and propensities of the law enforcement officials.[56]

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[54] Testimony of Lieutenant Richards, *Hearing on Motions to Dismiss,* April 25, 1972, at 5, 23-24; Mrs. Edward Anderson, Common Cause, testimony before District of Columbia Commission on the Status of Women, October 1971. See also: "The Flatfoot Floozies," *Newsweek* (May 18, 1970) at 99; *Time* (May 18, 1970) at 44.

[55] United States Attorney Form 16-G15, Superior Court Information.

[56] While it is possible at least that these sex-specific pronouns may be crossed out and the other gender substituted on the forms, the Court has been shown no evidence tending to substantiate this bare allegation. The Court is persuaded to the contrary: that this substitution does not occur.

Such attitudes are inconsistent with constitutional notions of equal protection.

The Court finds further that the deliberate enforcement policies of the Metropolitan Police yield results quite consonant with their intent. Women are far more frequently arrested, prosecuted, convicted and incarcerated for soliciting prostitution than their male counterparts. Hyperbole would be mere description in characterizing this disparity in treatment. These enforcement practices are the natural fruition of a discriminatory intent; together they work an invidious deprivation of rights against women.

To demonstrate the pervasive nature of this discrimination, it is important to trace the successive steps of the criminal process and the impact of each of them on the female soliciting for prostitution, with an eye to the comparative outcome for the male solicitor of prostitution. Defendants have presented evidence documenting the disproportionate severity of the treatment reserved by the criminal justice administration system for females.[57] Prostitution offenses account for a very great percentage of

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[57] Defendants also assert that penalties imposed pursuant to § 22-2701 constitute cruel and unusual punishment in contravention of the Eighth Amendment. Defendants argue that a penalty runs afoul of the Eighth Amendment when it is applied in an arbitrary and invidious manner, directed against only one class of potential offenders while others who violate the terms of the statute are exempted from similar threats of punishment. See *Furman v. Georgia*, 408 U.S. 238 (1972); *People v. Sinclair*, 387 Mich. 91, 194 N.W.2d 878 (1972). Defendants concede that this cruel and unusual punishment argument, as formulated, directly relates to their equal protection claims. In view of this Court's dispositon of the latter, it is unnecessary to decide whether Eight Amendment issues are implicated in these case.

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the women who are brought into the criminal process. In fact, "(t)he largest number of women arrested locally are charged with the victimless crime of prostitution and related offenses."[58] Of the 2,791 police cases committed to pre-arraignment detention at the Women's Detention Center in 1969, twenty-one per cent (21%) were arrested on charges of soliciting prostitution, the largest percentage for any single offense.[59, 60] Understandably, the government has not even attempted to demonstrate enforcement of § 2701 against males soliciting for prostitution. Such a showing would require nothing short of sleight of hand. Instead the government relies upon the notion that the arrest of men for "soliciting for lewd and immoral purposes" is the male analogue of the female offense of soliciting prostitution (an assumption which is dealt with *infra*). Accordingly, a direct comparison of male and female arrests and dispositions for the identical offense of soliciting prostitution is not possible.

At the prosecutorial level, the evidence confirms the enormously disproportionate enforcement of the soliciting

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58 *Female Offenders in the District of Columbia:* Report based on hearings by the District of Columbia Commission on the Status of Women (April, 1972), at 18.

59 *Movement and Characteristics of Women's Detention Center Admissions, 1969,* Research Report No. 39, District of Columbia Department of Corrections (May, 1971).

60 Parenthetically, another twenty per cent (20%) were arrested and delivered to the Women's Detention Center for disorderly conduct, "a charge understood to be used to detain alleged prostitutes when actual proof is not available." (*Female Offenders in the District of Columbia, supra,* at 18.)

statute against females. Defendants have presented data compiled by the Criminal Clerk's Office of the Superior Court, revealing that during the years 1968, 1969, and 1970, "soliciting prostitution" represented over eighty per cent (80%) of the offenses charged under D.C. Code § 22-2701. This charge, of course, is invoked only against females, as hinted by the language of the Information form. The remainder of the offenses charged under § 2701 were "soliciting for lewd and immoral purposes," the subsection administered as a male homosexual offense. Not only were there relatively few male arrests under *any* provision of the statute, but once again the male patron soliciting for prostitution was exempted from the criminal process.

Nor are the ensuing judicial proceedings shown to correct the bias of the initial stages of the process. The records of the District of Columbia Bail Agency support defendants' contentions; during the past 18 months, twenty-six per cent (26%) of those (i.e., females) arrested for soliciting prostitution were sentenced to terms of incarceration, the highest rate of incarceration for any offense in the District of Columbia. As defendants have pointed out, 42.5% of the total population confined at the Women's Detention Center in 1969 was committed for soliciting prostitution. These inmates accounted for 69.1% of all misdemeanor commitments to that facility. Moreover, forty per cent (40%) of all inmates serving sentences of one month or more were sentenced for soliciting prostitution.[61] Even were sentencing patterns for "soliciting

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61 *Movement and Characteristics of Women's Detention Center Admissions, 1969,* Research Report No. 39, at 18, 21.

for lewd and immoral purposes" deemed the relevant data for comparison, as the government suggests, the evidence would be probative of great discrepancies in treatment of the sexes. During the same year (1969), no more than half of one per cent (0.5%) of the total population of the District of Columbia Jail was incarcerated for "soliciting for lewd and immoral purposes." Even if the prostitution-related felony offenses of pandering, procuring, and attempted procuring are included in the count, the total number of men incarcerated for all prostitution-oriented offenses only comprises approximately four per cent (4%) of the population of the District of Columbia Jail.[62, 63]

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62 *Movement and Characteristics of District of Columbia Jail Admissions, 1969,* Research Report No. 43, District of Columbia Department of Corrections (1971).

63 Although data concerning practices in other jurisdictions are not probative of the state of affairs in the District of Columbia, it is instructive to notice that the cultural attitudes which engender sexually discriminatory enforcement of prostitution laws are so deeply ingrained as to persist even where the legislature has evidenced a clear intent to penalize equally both parties to an act of prostitution. In New York, where a statute has been enacted providing identical prohibition of patronizing a prostitute, prodigious disparities in enforcement remain.

In 1968, there were 112 prosecutions for patronizing a prostitute as compared with 8,000 for prostitution in the State of New York. (Common Cause, Testimony before District of Columbia Commission on the Status of Women, October 1971.) According to data supplied by the New York City Police Department, the arrests in that city during 1971 comprised 7,022 for female prostitution, of which 5,125 were fined, 1,001 incarcerated, and 1,017 given conditional discharges. Of the 453 persons arrested during the same

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The Court perceives that males soliciting contracts for sexual behavior always fare much better in the criminal justice system than females. The male homosexual

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63 (continued)
period, all 453 were given conditional discharges; none was jailed nor fined. The figures for January-February, 1972, follow a similar pattern: of 817 female prostitute arrests, with 379 completed dispositions, 118 women were fined, 67 jailed, and 16 conditionally discharged. Of the 87 patrons arrested, all 87 were again conditionally discharged; no fines, no jail sentences were imposed. The procedural exceptions made to ease the plight of the occasional arrested patron also evince a marked double standard in his favor. Where customers are arrested, judges and police are careful to preserve their anonymity, while the same courtesy is never extended to the female prostitute; the customer is not subjected to a venereal disease test upon arrest as is the arrested female prostitute, even though he may as readily be infected; and a complete investigation of the customer is not made nor a report submitted to the Court by the Probation Department as is done with the women prostitute to assist the court in imposing sentence. ("Politics and Criminal Law: Revision of the New York State Penal Law on Prostitution," Pamela Roby, 17 *Social Problems* 83, (1969-70) at 92.) Here, too, it would be naive to suppose that considerations of race and socioeconomic class are not concomitant factors in policy creation. But the full burden of this discrimination is carried by the female, whether or not she be also black or poor. For "[i]n any event, the invocation of these statutes (against males patronizing prostitutes) is less likely to be designed to punish the male or control his future activities than it is to coerce him to cooperate with the prosecuting authorities by testifying against the woman." (B.J. George, Jr., "Legal, Medical, and Psychiatric Considerations in the Control of Prostitution," 60 *Michigan Law Review* 717 (1962) at 730.)

The Court is sobered by information such as that contained in the foregoing excursus; and reminded that courts must be extremely vigilant for the invidious discriminations, subtle and overt, to which this society commonly subjects the female prostitute.

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prostitute has considerable odds in his favor; the heterosexual male patron bears no risk at all. The female solicitor, the proverbial "fallen woman," is scapegoat for the sins of all. Her continued immolation at the hands of law enforcement personnel charged with administering equal justice under law can no longer be tolerated. This Court finds both the intent to discriminate as well as outright discriminatory practices exist in the application of § 22-2701.

The government, in attempting to rebut defendants' contentions of unequal protection of the laws, has made arguments which demonstrate how completely it has failed to understand the issues in these cases. Defendants maintain, and the Court agrees, that certain classes of offenders are deliberately and arbitrarily exempted from the operation of § 2701 to the detriment of others similarly situated. In the instant cases, enforcement policies have been intentionally focused on women while ignoring males equally likely to commit the offense of soliciting prostitution. The government counters with the allegation that males who solicit for lewd and immoral purposes are subject to arrest and prosecution under § 2701. The inference which the Court is asked to draw is that female arrestees for soliciting prostitution may therefore not be heard to complain of willful discrimination in the administration of the statute. The Court simply cannot adopt such an inference, for it is based upon a contention premised upon omissions and misconceptions.

The arrest of females who solicit males and of males who solicit males obviously neglects whole categories of individuals who can invite, entice, or persuade another to participate in sexual activities for a consideration. It is manifest in fact as well as in logic that females can solicit other females, and that males can solicit females in the

role of either buyer *or* seller of services. Even if we assume *arguendo* that prostitution encompasses only heterosexual contracts for sexual activity,[64] there remain four possible modes of solicitation "for the purpose of prostitution," with either male or female as vendor, and with either male or female as vendee. Even were the Court further to assume with the government that prostitution usually entails a female vendor and a male customer[65] – a formidable assumption to say the least – the male customer may as readily solicit a female for the purpose of prostitution as she may solicit a male patron. The prosecution manages carefully to limit its delineation of the male solicitor to the homosexual, maintaining that the arrest of male solicitors for lewd and immoral purposes serves to balance the equation. In a world fortunately not yet unisexual, emphatically it does not.

The government then offers a sort of informal demurrer, arguing that although the sort of disproportionate application of the statute of which defendants complain may well exist, it presents no forbidden discrimination because it reflects cultural verities. Counsel for the government avers that it is a "basic cultural fact that very few males solicitate [sic] females for the act of prostitution (i.e., to be

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64 Such an assumption would entail other serious problems of denial of equal protection to heterosexuals since homosexual solicitation would then fall under the rubric of "soliciting lewd and immoral purposes," a statutory sub-category which was recently invalidated by this Court for constitutional defects. See *United States v. Kenneth Binns, et al.*, Cr. No. 14119-70.

65 The Court does so at least partially in deference to Lieutenant Richards' testimony that he has only encountered gigolo cases "in the movies."

paid for having heterosexual acts with a female) . . ."[66] As has already been established, it is constitutionally impermissible for the statute to be construed on its face to mean that only women *can* engage in and solicit for prostitution. Therefore, the Court finds the government's present allegation that only women *do* solicit for the purpose of prostitution equally untenable because of its inconsistency both with logic and with the clear weight of the evidence. It plainly fails as a justification of current enforcement policies.

The prosecution apparently believes that a male could only be said to solicit for prostitution if he were attempting to market his services as gigolo to a woman, and this is supposedly an uncommon occurrence. No definitive data have been presented on the prevalence of such practices, but such data is not necessary to a resolution of the issue. The Court takes judicial notice of the fact that there is a patron involved in virtually every contract for prostitution, generally a male where the prostitute is female. From the recent discussion, *supra,* it is clear that either party, regardless of sex or transactional role, may be the initiator of that mutual encounter. Consequently, either party can violate the law prohibiting solicitation for purposes of prostitution.

Nor does common information support the governmental allegation. The Kinsey report estimated that sixty nine percent (69%) of the adult male population visit prostitutes

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66 *Points and Authorities in Opposition to Defendant's Motion,* at 3.

with varying degrees of frequency,[67] while Benjamin and Masters estimate eighty percent (80%).[68] It defies reason to suppose that all these men, having sought out areas which female prostitutes are known to frequent, have unanimously waited demurely on the sidewalk, hat in hand, to be approached by a female, especially in the light of another "basic fact" of our culture, the male-aggressor syndrome. As Lieutenant Bishop of the Morals Division said in explaining that undercover police have a difficult time getting the female prostitute to make a sufficient, spontaneous solicitation to uphold a prostitution conviction, "the normal individual out here that is looking for a woman is not quite that restricted."[69]

Thus, a man who goes to an area frequented by prostitutes with the intent of meeting a female prostitute is as likely to violate the statute as is the prostitute herself. Nevertheless, the Metropolitan Police Department concentrates all its enforcement efforts by the use of detectives and undercover men posing as potential customers of female prostitutes so that these prostitutes will be apprehended, and none of its efforts on posing as female prostitutes so that potential male customers will be apprehended. Under such circumstances, the Court concludes that the defendants have met their obligation to demonstrate

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67 *Sexual Behavior in the Human Male*, Kinsey, Pomeroy and Martin (1948) at 597.

68 *Prostitution and Morality, supra*, at 208.

69 Walter E. Bishop, Morals Division, M.P.D.C., Testimony before District of Columbia Commission on the Status of Women (October 1971).

a systematic and intentional discrimination in the enforcement of D.C. Code § 22-2701, *Edelman v. California, supra.* The burden remains on the government to justify its failure to enforce the statute against males who violate its terms. However, no imperative governmental interest appears to explain the necessity for this discriminatory enforcement policy.

The United States Attorney at the hearing on these motions indicated that the purpose of this statute is to keep prostitution off the streets. Even if discriminatory enforcement of the statute were the only means by which this goal could be accomplished, a dubious proposition at best, the suppression of street solicitation is not so urgent a priority that it may be achieved at the expense of simple justice. Discriminations made along the lines of suspect classifications or affecting fundamental liberties have survived judicial review only in extreme circumstances. For example, the Japanese internment policy upheld in *Korematsu v. United States, supra,* was validated by the threat of impending military invasion and fear of wartime espionage.[70] Comparison of the justification for that situation

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[70] It is instructive to note that the purported national security dangers in *Korematsu* are now generally recognized to have been greatly exaggerated in comparison with the extreme deprivations suffered by the Japanese-Americans in their name. See, e.g., B. Hosokawa, *Nisei: The Quiet Americans,* 292-98 (1969). In fact, in retrospect, the internment of so many loyal Americans has been recognized as a major national disgrace brought about in large measure by reliance on myth supported by hysterical discrimination against a group that was "different" as a function of the accident of birth.

with the alleged perils in the instant case would approach the ridiculous.

Governmental interests more on a par with those asserted here, such as the maintenance of civil order, have proved inadequate to justify an invidious discrimination. See, e.g. *Dawson v. Mayor and City Council of Baltimore,* 220 F.2d 386 (4 Cir. 1955), aff'd per curiam *sub nom. Mayor and City Council of Baltimore v. Dawson,* 350 U.S. 877 (1955). Where basic rights are at stake, even governmental concerns as pressing as the fiscal integrity of the state have not availed to satisfy the demand of equal protection. See, e.g., *Graham v. Richardson,* 403 U.S. 365 (1971); *Shapiro v. Thompson, supra.*

However, even if the Court were to assume that the suppression of street solicitation might conceivably be considered a "compelling" governmental concern, it remains unclear why discriminatory enforcement of the statute is *necessary* to that goal. See *Loving v. Virginia, supra.* To prove the required relationship between the discriminatory enforcement of the statute against women and the purported goal, the government must show not only that this goal is positively furthered by the exclusive pursuit of female offenders, but also that the attempt to enforce the statutory prohibition against men would hinder the accomplishment of that goal or entail some other adverse consequence. Mere administrative inconvenience incident to the attempt to enforce the statute with an even hand would not justify the discrimination, even if the less exacting "reasonable relationship" test were employed. Cf. *Reed v. Reed, supra.* However, far from involving any extraordinary and burdensome efforts on the part of the police, even-handed enforcement of the statute would appear

relatively easy to accomplish. As male police officers are now deployed to await solicitation by female prostitutes, female police officers could similarly be used to attract solicitations from male patrons. The successful use of this approach for a time by one District Vice Squad attests to its feasibility. Presuming the propriety of continued criminalization of solicitation activity, the present "decoy" system for making arrests could easily be expanded to encompass both sexes.

Just as there is no insurmountable practical barrier to the equal enforcement of this statute, there appears to be no practical advantage gained by its discriminatory application. The tired routine of rounding up female prostitutes and putting them away for a few weeks or months, only to see them reappear on the street when their time is up and their criminal record and lack of job training have closed the doors to other sources of income, indicates that perhaps the least effective way to eradicate street solicitation is the arrest and conviction of the female prostitute. That the visible aspects of solicitation for prostitution persist despite the routine pursuit of the female prostitute casts serious doubts on the proposition that the governmental aim is advanced at all by these discriminatory practices.[71]

In focussing their repressive efforts solely on the female prostitute, the police have concentrated on attempting to

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[71] Another aspect of this type of law enforcement is the opportunity that exists for corruption. Cf. *United States v. Crook, et al,* Cr. No. 150-72 (D.C.D.C.), reindicted as *United States v. Ciancotti, et al.,* Cr. No. 1795-72, and *United States v. Crook,* Cr. No. 1796-72.

curtail the supply of the service contracted for, while totally ignoring the indispensible factor of demand. The continued existence of the institution of prostitution would seem to depend upon the interaction of both supply and demand. The fact that one female prostitute may negotiate a number of transactions in an evening, while the male customer may stop making advances after one successful solicitation, does not lead inexorably to the conclusion that the target of enforcement efforts should be the female who supplies the service. Such reasoning ignores the fact that, without customers to solicit, the prostitute would not seek her contacts on the street. A noted authority on the law's treatment of women has made this point succinctly: "The fact remains that the female prostitute simply could not exist without male customers."[72]

Unless a conscientious policy of enforcement is carried out against the men who demand and pay for this service, assumptions about the relative inefficacy of non-discriminatory practices must remain mere speculation. It might well be discovered that a consistent and well-publicized policy of arresting, prosecuting, convicting, and sentencing male customers under this section for soliciting prostitution would quickly eliminate solicitation and accomplish the government's alleged aim.[73]

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72 Leo Kanowitz, *Women and the Law: The Unfinished Revolution* (1969), at 17.

73 For example, the Soviet practice of listing the names of male customers in newspapers and on publicly displayed posters under the heading "Buyers of the Bodies of Women" has been cited as a major reason for the success of the Soviet Union in eliminating prostitution. See Kanowitz, *Women and the Law, supra,* at 17-18.

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The fact that adverse public response to the short-lived experiment of the Third District Vice Squad was apparently so forceful suggests that the average male customer could find the genuine threat of criminal prosecution a powerful deterrent. While the stakes may be high for a woman who has already been stigmatized by arrest and conviction, and who has few alternatives in any event, the "occasional" customer from the suburbs, with a job and a middle-class reputation to protect, stands to lose a great deal by exposure to the criminal process. A serious enforcement effort directed at the male customer, maintained even in the face of public outcry, could make seeking the services of a prostitute so dangerous an indulgence that demand for such services would evaporate. Without the customer, the prostitute would have no reason to continue offering to supply the service.

While this scenario is largely speculative, it is surely at least as reasonable as the set of assumptions which seem to underlie traditional efforts toward the suppression of prostitution-related activity. For all its inequitable shortcuts, the current enforcement practice appears to have had little impact on the persistence of the demand for these services and therefore on the available supply to fill that demand. Where an invidious discrimination bears so little perceptible relation to the ends toward which it is ostensibly directed, and where it seems that even-handed application of the law would advance those ends with even greater efficiency, the discrimination cannot satisfy the requirement of a "reasonable relationship" between end and means, much less the more stringent requirement of its necessity to some compelling governmental interest.

In the final analysis, the solicitation prohibited by §22-2701 is the same offense whether committed by a female

prostitute or by a male patron. Penalizing the prostitute while absolving the patron reflects sheer sexual bias. As one perceptive court long ago observed:

> "The men create the market, and the women who supply the demand pay the penalty. It is time that this unfair discrimination and injustice should cease. . . The court is aware that it has been the custom heretofore followed to arrest the women and let the men go; but the time has come when the custom cannot longer be permitted to continue . . . The practical application of the law as heretofore enforced is an unjust discrimination against women in the matter of an offense, which in its very nature, if completed, requires the participation of men." *People v. Edwards*, 180 N.Y.S. 631, 634-5 (1920).

While a finding that § 22-2701 is applied in violation of basic tenets of equality is founded upon the manifest sex discrimination apparent in these cases, the court observes that §2701 is also enforced primarily against members of racial minorities and poor people. Such enforcement would, of course, involve more traditional suspect classifications and raise additional problems of equal protection. The inter-relationships of race and poverty in America have been well documented in contemporary writing. Their coincidence in a given situation constitutes an especially suspect classification. Accordingly, where the factors of sex, race, and class all interpenetrate, and persons characterized by this three-fold constellation of traits are singled out for discriminatory treatment by the terms or application of a statute, the classification is so suspect that it is nearly impossible to imagine a state interest

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sufficiently compelling to justify it. It is quite clear that the "soliciting prostitution statute as applied appears to involve such a multiple classification.

The enforcement practices of §2701 are directed overwhelmingly to the streetwalking prostitute who is much likelier than her "call-girl" counterpart to be a lower-class black woman.[74] Since the call-girl by definition does not approach her clientele to generate business but waits to be sought out, it is most unlikely that she could be considered the solicitor of a transaction. The efforts of the Metropolitan Police to enforce §2701 are admittedly aimed at the streetwalker; their efficacy is attested by the population of the Women's Detention Center. Eighty-six per cent (86%) of the women incarcerated for soliciting prostitution in 1969 were black.[75] Similarly, the Annual Police Report for 1971 shows that 83% of female arrestees for any misdemeanor-level offense were black.[76]

Moreover, most male patrons of female prostitutes are shown to be white, middle-class, middle-aged suburbanites.[77] (In fact, the members of the Prostitution, Perversion, and

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74 See, e.g., James, "A Formal Analysis of Prostitution in Seattle," *supra, passim;* Benjamin and Masters, *Prostitution and Morality, supra,* at 103, 104, 136.

75 *Movement and Characteristics of Women's Detention Center Admissions,* Research Report No. 39 (1969), *supra,* Table 14, at p. 27.

76 Annual Report, Metropolitan Police Department, *supra* (1971), at 43.

77 See "Client's Perceptions of Prostitutes and of Themselves," Charles Winick, *International Journal of Social Psychiatry* (1961-62); (continued)

Obscenity Squad are all white males, this composition having been deliberately chosen so that the officers might better resemble the average customer of female prostitutes). It is not difficult to imagine the reticence of certain law enforcment personnel to arrest middle-class white males, especially when the other potential target of the enforcement campaign is typically a lower-class black woman.

Where the same offense is likely to be committed by both groups with comparable frequency, with enforcement practices resulting in an overwhelming concentration of arrests, prosecutions, and convictions within one group characterized by a certain constellation of traits, and where these traits are all suspect classifications, the inference of impermissible intent on the part of the authorities is inescapable. Such an inference, however, is not required by the classification relied on by defendants here (viz., sex), for the evidence already cited reveals a deliberate and unjustifiable policy of discriminatory enforcement against women.

The practical application of D.C. Code §22-2701 exclusively against the female offender constitutes a discrimination so unjustifiable as to violate due process notions of equal protection of the laws. These defendants, as mem-

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[77] (continued)

Benjamin and Masters, *Prostitution and Morality*, *supra*, at 104; James and Burnstin, *"Prostitution in Seattle," supra*, at 28. Dr. James' study found that 95.8% of the patrons of female prostitutes in Seattle were white. The average age of male customers was 30-60 years (69.6%), with the typical occupations of businessman (35.0%), salesman (10.6%), Boeing employees (13.8%), and lawyers and accountants (11.4%); "A Formal Analysis of Prostitution in Seattle: Final Report," *supra*.

bers of the class against whom the law is discriminatorily enforced, may not constitutionally be singled out for prosecution on a basis so arbitrary as their sex. Thus, the court is presented with a situation in which a suspect classification is used as the basis for a determination entailing potential deprivation of liberty for engaging in conduct that is not properly the state's concern. In such a case, fairness demands proof of a compelling state interest; this demand remains unfulfilled. Accordingly, the informations must be dismissed as irreparably tainted with the invidious discrimination of the selective enforcement which produced them.

CONCLUSION

The holdings of this Court on the constitutional issues presented in these cases collectively and independently require the invalidation of D.C. Code §22-2701.

The informations are hereby dismissed.

/s/ Charles W. Halleck
Judge

November 3, 1972
Date